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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960/62

No. [redacted] 17

IDEAL FARMS, INC.

and

FRANKLIN LAKES DAIRY PRODUCERS, INC.,
Petitioners

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Ideal Farms, Inc. and Franklin Lakes Dairy Producers, Inc. pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered on February 27, 1961, at No. 13,263 below. Re-hearing denied March 23, 1961.

Opinions Below

The Opinion of the United States District Court for the District of New Jersey is reported in 181 F. Supp. 62 (1960). The Opinion of the United States Court of Appeals for the Third Circuit is reported in 288 F. 2d 608 (1961). Both Opinions, together with the Dissenting Opinion in the Third Circuit, are printed in the Appendix hereto.

Jurisdiction

The judgment of the United States Court of Appeals for the Third Circuit was entered February 27, 1961. The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254.

Question Presented

These proceedings are brought under the Agricultural Adjustment Act of 1933, as amended by the Agricultural Marketing Agreement Act of 1937, 7 U. S. C. 601, et seq. It was declared in these Acts to be the policy of Congress, through the powers conferred upon the Secretary of Agriculture, "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish, as the prices to farmers, parity prices. . . .". By the authority of the Act, the Secretary of Agriculture has established marketing orders to regulate the handling of milk and milk products in various marketing areas throughout the country. The issues in the present case arise out of certain provisions included by the Secretary in Order No. 27, the Milk Marketing Order in effect in the New York–New Jersey Milk Marketing Area. Under the Order, handlers are required to equalize their payments to producers for milk purchased by making payments into or withdrawing from an "equalization fund" operated by the Market Administrator for the Marketing Area. The Act authorizes such equalization for milk "purchased from producers." *However, the Order, as it is presently en-*

faced, requires that producers who process and sell their own product (defined in the Order as "handlers"), are required to pay into the equalization fund for distribution to other producers, sums based upon their own-produced *milk.* Therefore, the question presented is:

Did the Secretary of Agriculture exceed the authority vested in him by the Act in promulgating § 927.65 of Order No. 27, which purports to make a handler accountable to the producer settlement fund for milk which he produces on his own farms from his own herds?

Statutes and Orders Involved

The statute involved is the Agricultural Marketing Agreement Act of 1937, Act of June 3, 1937, 50 Stat. 246, 7 U. S. C. § 601 et seq. Provisions essential to this case are set forth in the Appendix hereto, page 11.

The administrative order involved herein is Order No. 27, as amended, regulating the handling of milk in the New York–New Jersey Milk Marketing Area. The amendments under attack were issued by the Secretary of Agriculture of the United States, to become effective August 1, 1957 (7 C.F.R., Section 921.1 et seq., 1957). The particular provisions directly involved in this case are those of Section 927.65. They appear in the Appendix hereto, page 14.

Statement of the Case

There is no disagreement between the parties with respect to the factual situation giving rise to this cause of action. Petitioners, Ideal Farms, Inc. and Franklin Lakes Dairy Producers, Inc., are processing and distributing milk producers and as such are designated milk handlers under the terms of Order No. 27. Order No. 27 regulates the handling of milk in the New York–New Jersey Milk Marketing Area. Petitioner "Ideal" buys no milk from other producers but does buy some milk to supplement its own pro-

duction from other pool handlers who are subject to the provisions of Order No. 27. Petitioner "Franklin Lakes" has an almost identical operation to Ideal, with the sole difference that Franklin Lakes supplements its milk supply from its own farms with milk it buys from other dairy farmers.

Order No. 27 requires each handler to report the total quantity of milk it handles and the use to which said milk was put. The handler then multiplies the amount of milk put to each class use by the class price (fluid use returns a high class price, manufacturing use returns a lower class price), and adds the resultant figures to arrive at a total figure; this is known as the handler's net pool obligation. By virtue of pooling all handlers' total obligations, through an "equalization fund," the result is that the handler does not owe his total obligation to the producers from whom he received the milk, but rather owes it proportionately to all producers in the entire milk marketing area.

By dividing the total weight of all milk handled in the marketing area each month into the total of all handlers' obligations, the Market Administrator computes what is known as a uniform or blend price to which each producer is entitled irrespective of the utilization of the particular handler to whom he ships his milk.

Order No. 27 required the inclusion of handlers' own produced milk into such computation for the first time with the amendment of August 1, 1957. It is this drastic, and we submit unlawful, extension of administrative authority which is contested in these proceedings.

Petitioners filed their administrative appeal on the first effective date of the Order, August 1, 1957, pursuant to Title 7, U. S. C. § 608c(15)(A), challenging the validity of Section 927.65 of Title 7 of the Code of Federal Regulations. After due hearing, the Hearing Examiner issued his Report recommending that the petition be dismissed (Appendix C). Thereafter oral argument on exceptions to the Report of the Hearing Examiner was held before the Judicial

Officer of the Department of Agriculture. The Judicial Officer, acting for the Secretary of Agriculture, dismissed the petition. The Opinion of the Judicial Officer is reported in 17 Agricultural Decisions 1091 (1958) (Appendix D).

Thereafter, on November 28, 1958, Petitioners filed their Complaint in the United States District Court for the District of New Jersey, pursuant to Title 7, U. S. C. § 608c-(15)(B), to review the action of the Secretary of Agriculture. On February 10, 1960, Honorable Reynier J. Wortendyke, Jr. filed his Opinion, reported at 181 F. Supp. 62, (Appendix E).

On June 2, 1960, an appeal to the Court of Appeals for the Third Circuit was docketed. In an Opinion by Honorable Phillip Forman, the majority of the Court below decided February 27, 1961, in favor of the affirmance of the District Court. Honorable William H. Hastie dissented from the majority. Re-hearing was denied March 23, 1961. The posture of this case as it comes before your Honorable Court is that Petitioners, under the Order and under the majority decision of the Court of Appeals, are required to contribute each month to the equalization fund substantial sums which are calculated on quantities of milk they produce themselves and purchase from no one.

Reasons for Granting the Writ

I. The Decision of the Court Below Conflicts with the Standing Decision of the United States District Court for the Southern District of Mississippi.

The decision of the United States District Court for the District of New Jersey and the decision of the Court of Appeals for the Third Circuit are in conflict with a decision of the United States District Court for the Southern District of Mississippi. This latter decision is presently on appeal in the United States Court of Appeals for the Fifth Circuit (*Ezra Taft Benson, Secretary of Agriculture v. L. B. Vance, et al.*, No. 18,731). The *Vance* case involves

the terms of Order No. 87 which provide, with respect to the pooling or equalization of a producer-handler's own farm production, substantially the same provisions and requirements as those now in effect in Order No. 27. The decision in the *Vance* case is clearly in accord with the dissenting opinion of Judge Hastie in the *Ideal* case. It is conceded that the possibility of a decision by the Fifth Circuit reversing the present judgment in the *Vance* case exists. Argument was held before the Court of Appeals in New Orleans on April 25, 1961. However, it is necessary in order that the rights of Ideal and Franklin Lakes be protected for this Petition for Certiorari to be submitted to this Court within the prescribed period.

The variance in the construction of the applicable statutory limitations by men of great competence and insight points up, we respectfully submit, the necessity for a determination by this Court which will preclude the inevitable blossoming of these cases all over the United States. It appears to be the plan of the Department of Agriculture to insert provisions similar to those here under consideration and those in Order No. 87 in all of its seventy-nine Marketing Orders where the quantity of milk sold by producer-handlers is at all appreciable. Traditionally the Department has made no effort to require the equalization of handlers' own farm production, and this we submit was a necessary conclusion drawn from a natural reading and conclusion of the statutory language.

The long-standing administrative practice of not attempting to regulate producer-handlers with respect to their own farm production has encouraged innumerable farmers all over the United States to process and distribute their own production in such a manner as to maintain a level production, consistent with the needs of their respective customers. This is an optimum condition in the milk industry.

It should be noted that distinction is clearly drawn between milk such producer-handlers actually produce for

themselves and such additional quantities of milk as they may purchase from others. Clearly, in this latter situation, the Act is unequivocal and controlling. See Section 8c(5)(C):

> "In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the *milk purchased* by him at the prices fixed in accordance with paragraph (A) of this subsection." (Emphasis added)

The settled administrative practice of many years, therefore, draws the clear and valid distinction that a contact of purchase by a producer-handler would be subject to the fixed price, whereas a producer-handler who did not contract to purchase milk supplies would not be regulated. This settled administrative construction is completely consistent with the decision in the *Vance* case and the dissent of Judge Hastie in the instant case.

In short, no matter how broad a construction can or should be given to the word "purchased," there can be no interpretation of this word which would obviate the need for a contract of purchase, i.e., a commercial transaction between two or more separate entities or persons. To hold otherwise would be to remove limitations which the Congress established upon the authority of the Secretary of Agriculture, and reference to the majority opinion of the Court of Appeals in this case would ultimately lead to the elimination of every restriction Congress has placed on the power and authority of the Secretary. We earnestly submit that the majority decision of the Court below should not be permitted to stand in the face of the well-reasoned and considered thoughts of Judge Hastie, and the District Court in the *Vance* case, without the presentation of the entire matter to this Court.

II. The Court of Appeals for the Third Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by this Court.

As indicated above, there is an apparent move in the United States Department of Agriculture to extend its regulation to, and require equalization of, handlers' own farm production in many areas across the country. This we submit imposes a penalty or tax which is substantial, and even confiscatory in some instances. This is inconsistent with and has no relationship to the over-all purpose of the Marketing Agreement Act. The purpose of the Act is to stabilize and increase farm income through fixed prices of purchased raw milk. The Marketing Agreement Act concerned itself with the situation of the farmer whose bargaining power was seriously impaired both by the surplus of various commodities and by the perishability of farm goods. The purpose of the Act is to re-establish farmers' income *(U. S. v. Rock Royal Co-Op.*, 307 U. S. 533), through the medium of a fixed price on milk *sold* to handlers *(Kass v. Brannan,* 196 F. 2d 791, CA 2, 1952). Sufficiently broad power was given to allow a price to be fixed which would return full parity to farmers in the worst of markets and marketing conditions (7 U. S. C. 608c (18)). There is nothing in the statutory purpose which in any way enlarges the application of the word "purchased," since Congress did not rely upon the equalized market-place price to increase the return to the farmer, but rather upon the addition thereto of a fixed price. Indeed, there are a number of Federal Order Marketing Areas in the United States which do not use the device of an equalization fund at all and these have been proven eminently successful in returning to producers satisfactory prices for the milk which they sell.

The basic provisions of the Act were passed with a clear intention, demonstrated in the Congressional debates and

reports, to delegate only limited powers to the Secretary of Agriculture (79th Cong. Rec., 9461-9462, 9480). During the legislative evolution of the provisions of the Act, the Supreme Court decided *Schechter v. United States*, 295 U. S. 495. Pending bills to supplement and amend the Agricultural Adjustment Act of 1933 were thereupon revised. H. R. 8490 finally emerged from the Committee as the product of this process of revision. In this process precise delegation of legislative authority to avoid the ban of the *Schechter* case was the dominant congressional consideration. The Chairman of the House Committee on Agriculture, which reported the bill, said on the Floor (79th Cong. Rec., 9461):

> "We have undertaken to set out specifically just what these orders may and may not contain, thus furnishing a definite yardstick to guide the Department of Agriculture in making out the program under these 'orders'."

Other Committee members joined in expressing this intention. It appears clearly in the Report of the House Committee accompanying H.R. 9492 (House of Representatives, 74th Congress, 1st Session, Report No. 1241, June 15, 1945). The Senate report on the same legislation (Report No. 1011) states:

> "To eliminate questions of improper delegation of legislative authority raised by the decision in *Schechter et al. v. United States*, the provisions relating to orders enumerate the commodities to which orders issued by the Secretary of Agriculture may be applicable, prescribe fully the administrative procedure to be followed by the Secretary in issuing, enforcing and terminating orders, *and specify the terms which may be included in orders dealing with the enumerated commodities.*" (74th Cong. 1st Sess., May 3, 1945, Cal. Day July 13). (Emphasis added)

In *United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533, 575, the Supreme Court recognized the intent of Con-

gress here to prescribe limits to administrative action. The Court said:

> "Here the terms of orders are limited to the specific provisions, minutely set out in 8c(5) and (7). While considerable flexibility is provided by 8c(7)(D), it gives opportunity only to include provisions auxiliary to these definitely specified."

To permit a Court of Appeals decision to stand, which erases the word "purchased" from this statute would necessarily have vast implications in the entire field of statutory construction as it is being applied daily in other areas of the law. The majority decision here appealed from is in direct conflict with the statutory construction decision of this Court in *Addison v. Holly Hill Fruit Products,* 322 U. S. 607. Note the judgment of this Court with respect to statutory interpretation, at page 618:

> "After all, legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him."

Clearly the interpretation given to the word purchased by the Court of Appeals for the Third Circuit should not be permitted to stand.

Conclusion

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Statute Involved

MILK AND ITS PRODUCTS; TERMS AND CONDITIONS OF ORDERS.

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, *for Milk purchased* from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the *milk purchased*, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers. (Emphasis added.)

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them; *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk, produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irre-

Appendix A—*Continued*

spective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the *milk purchased* by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the *milk purchased* by him at the prices fixed in accordance with paragraph (A) of this subsection.

(D) Providing that, in the case of all *milk purchased* by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection.

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection, for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and

Appendix A—*Continued*

security for, the payment by handlers for *milk purchased.*

(F) Nothing contained in this subsection is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of sections 291 and 292 of this title, engaged in making collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all of its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contracts between the association and its producers; *Provided*, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States. (Emphasis added)

APPENDIX B

Order Involved

The administrative order involved herein is Order No. 27, regulating the handling of milk in the New York-New Jersey Metropolitan Milk Marketing Area, promulgated by the Secretary of Agriculture of the United States.

The pertinent provisions of this Order are found in Section 927.65, subsection (h):

> "(h) Milk specified in subparagraphs (1) through (3) of this paragraph shall be excluded from the computation of the handler's net pool obligations pursuant to this section.
>
> (1) Milk received from farms in Nassau and Suffolk Counties in New York, which farms are not approved for sale of milk in New York City, and milk received from farms in New York City.
>
> (2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers, but is received from other plants.
>
> (3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant."

The regulation of milk other than "own produced milk" is not here an issue. Therefore, the remaining subdivisions of Section 927.65 are not reproduced.

APPENDIX C

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:

JACOB TANIS, *et al.*, and IDEAL FARMS, INC., *et al.*,
Petitioners.

AMA DOCKET NO. 27-120 AND AMA DOCKET NO. 27-122

EXAMINER'S REPORT

These are two proceedings under Section 8c(15)(A) of the Agricultural Marketing Agreement Act of 1937 (7 U.S.C. 601 *et seq.*), consolidated for purposes of the oral hearing and of this decision. The proceedings were instituted by petitions filed on August 1, 1957, by persons and firms engaged in the handling of milk in the New York-New Jersey metropolitan area. Order No. 27 (7 CFR, Part 927) was extended to regulate milk distributed in Northern New Jersey, and in other areas not here involved, as of August 1, 1957, as well as to that in the New York area formerly included in the Order. Petitioners allege that there was defective notice of the hearing on which amendments to Order No. 27 were based, and that the record of that hearing does not support the extension of the prescribed marketing area to Northern New Jersey, nor the application to New Jersey of the provisions concerning equalization payments for a handler's own milk production, and for direct delivery payments as applied to receiving stations. The Agricultural Marketing Service, United States Department of Agriculture, the respondent in both proceedings, filed answers on November 15, 1957, and August 23, 1957, contending that the hearing and the resulting amendments were "in accordance with law."

Petitioners' applications for interim relief were denied on September 13, 1957 (16 A.D. 877, 871).

The identities of petitioners are shown below in the Pro-

posed Findings of Fact. The petitions as filed contained others named as petitioners and an attack on Section 927.40 of the Order, but at the hearing some named as petitioners were dropped, and the attack on Section 927.40 was abandoned.

An oral hearing was held on the petitions, consolidated for hearing at petitioners' request, in New York City on May 7, 1958, before Hearing Examiner Jack W. Bain. Willis F. Daniels, of Daniels & Swope, Attorneys at Law, Harrisburg, Pennsylvania, appeared for petitioner, and John M. Durbin, Office of the General Counsel, United States Department of Agriculture, appeared for respondent. The Hearing Examiner ruled that the validity of the attacked amendments and provisions of the Order must be tested on the record upon which they were based, and not upon new evidence received in these proceedings. Official notice was taken of various items related to the hearing, herein called the promulgation hearing, at which that basic record, called the promulgation record, was made. Evidence was taken concerning the petitioners' operations and how they are affected by Order provisions, some of which were received for the limited purpose of determining whether petitioners should be exempted from Order provisions, and not for the purpose of determining the general validity of the provisions.

Respondent asked that official notice be taken of earlier promulgation records, going back to 1938, which served as the bases for putting the provisions here under attack into Order No. 27 before the marketing area included any of New Jersey. Petitioners objected, asserting that they are not attacking the provisions of the Order as they applied before August 1, 1957, but only as they were made applicable to New Jersey territory, and to these petitioners, by the 1957 amendments. In view of this statement and because older promulgation records were refused admission as parts

of the promulgation record for the 1957 amendments, the Hear Examiner sustained the objections.

Petitioners filed a consolidated brief in support of their contentions on June 5, 1958. Respondent filed an answering brief on June 28, and Petitioners filed a reply on July 8.

Proposed Findings of Fact

1 (a). Petitioner Ideal Farms, Inc., is a New Jersey corporation whose address is 955 Belmont Avenue, North Haledon, Paterson 2, New Jersey. William Tanis is its Vice President and Manager. It is a handler under Order No. 27, and operates a bottling plant in North Haledon at which it receives milk purchased from Ideal Farms Dairy Products, Inc. (see Finding 1 (d), below), but receives no milk from dairy farmers except milk from farms operated by it.

(b). Petitioner Franklin Lake Dairy Producers, Inc., is a New Jersey corporation whose address is Franklin Lakes, New Jersey. It is a handler under Order No. 27. It receives milk from Order No. 27 producers. It operates a receiving plant at Wantage, Sussex County, New Jersey, where milk is received from dairy farmers, checked for flavor, weighed, cooled, held, and shipped to the bottling plant of Franklin Lake Dairy, Inc., 37 miles away and to other companies.

(c). Petitioner Garden State Farms, Inc., is a New Jersey corporation whose address is Hawthorne, New Jersey. It is a handler under Order No. 27.

(d). Petitioner Ideal Farms Dairy Products, Inc., is a corporation whose address is 955 Belmont Avenue, Paterson 2, New Jersey. William Tanis is its Vice President and Manager. It is a handler under Order No. 27. It owns three milk receiving stations, at Washington, Lafayette, and Sussex, New Jersey, where milk is received from producers,

Appendix C—Continued

weighed, cooled, and shipped to the bottling plant of Ideal Farms, Inc. (see Finding 1 (a), above). It buys milk from producers, settles with the producer settlement fund of Order 27, and sells the milk to Ideal Farms, Inc. It produces no milk.

2-15. Proposed Findings 2 through 15 contained in Examiner's Report issued on August 6, 1958, in AMA Docket No. 27-121, in which docket the Hearing Examiner and counsel for both parties were the same as those in these two proceedings, are adopted by reference as Proposed Findings 2 through 15 in this consolidated Examiner's Report.

16. There is evidence in the record indicating the following:

It was proposed to exempt certified milk from equalizing. As to producer distributors who had no purchases from or sales to other producers or dealers, it was proposed to exempt not over 1,000 pounds daily, about the quantity a family farm could handle; and a farm producing over this quantity would pool its entire production. Another proposal was that partial exemption would be given up to 85% of Class I usage. A producer who bottles and sells all his milk but one can, and sends that can to a country plant, pools his surplus but does not pool his fluid utilization, which is bad. There was discussion of limiting exemption to those who owned herds on December 1, 1956, so there could be no big increase in own production. There are 200 or 300 producer dealers in Northern New Jersey and Upstate New York. Pooling their milk would not greatly affect the blend price, but there is the question of equity between them and other producers. By keeping part for his own production, a handler does not share his total market. There was discussion of custom bottling for a producer, and of the difficulty of detecting abuses of this. Cross-examination indicated antagonism to any exemption. The

Appendix C—*Continued*

family type farm should be exempted, and equity for it should be considered as its relation to similar sized producers, not its relation to handlers. Pooling all producers would increase the blend a little. 1,000 pounds is the best figure, as against 1,200 or 1,500. Pooling is socialistic, but as it stabilizes the market, it is not objected to. If producer handlers have to equalize, they will be put out of business. A producer handler could not produce milk for the blend price and come out. In Northern New Jersey there were 62 producer distributors (receiving no milk from others) and 22 dealers with producing farms. They are an important segment of the industry, producing 7%, or 59,000,000 pounds, of the annual production, or 5% of Class I sales in Northern New Jersey. In view of this volume and importance, they should be pooled, with no exemption. One with high utilization would have to pay to the pool something now kept. Exemption gives a competitive advantage of the difference between the blend and Class 1-A prices. (P.H.R. 12,970-12,973, 14,431-14,432, 14,452-14,455, 14,199-14,201, 14,221-14,222, 14,484-14,499, 14,541-14,558, 14,469-14,475, 14,820-14,844, 15,412-15,436.)

17. The evidence in the record includes the following:

Nearby producers have additional costs, and milk delivered nearby has greater value. Producers who have the additional cost and make the nearby direct deliveries should receive direct delivery payments; they should not go to the pool for all producers, nor to a separate pool. County plants which do not bottle milk should not be exempt: they are for the handler's convenience. Historically receiving stations near bottling plants have paid the same prices, and would have to do so by premiums to compete, even if exempted from direct delivery differentials. There were extensive cross examination, and discussion of various items considered in determining justification for the payments and their amounts. One proposal was for a 15¢ differential

applicable only to pasteurizing and bottling plants, and applying only to milk distributed as Class 1-A from those plants without reloading. A large part, if not most, of the cited testimony involved this latter proposal: i.e., it did not apply to receiving stations not bottling milk. (P.H.R. 14,177-14,199, 14,204-14,219, 14,222-14,247, 14,284-14,294, 12,982-12,998, 13,019-13,056, 13,064-13,085, 13,132-13,138, 13,205-13,209, 13,269-13,294, 13,712-13,738, 13,756-13,773, 14,004-14,008, 14,014-14,020 14,411-14,418.)

18. A recommended decision, signed by the Deputy Administrator referred to in Finding 2, was published on May 11, 1957, in the Federal Register (22 F.R. 3318-3357). It is there stated that the decision is based upon the record made at sessions of the hearing held from June 18, 1956, to March 29, 1957. Among the findings are the following:

(a) The handling of milk in Northern New Jersey should be brought under Federal regulation by amendment of Order No. 27 to include such area (22 F.R. 3318).

(b) A handler's own farm production was therefore completely exempt from equalization under Order No. 27, where the volume was relatively small. In Northern New Jersey, the volume of such production is larger relative to total fluid sales. Dealers in New Jersey with such production were then in competition with handlers whose producer supply was not priced or was at below the Order No. 27 Class 1-A price. Extension of the area would price this producer supply at the Class 1-A price. To fully exempt own production would materially increase the handler producer's competitive advantage, and would constitute an unwarranted incentive for additional producers to engage in milk distribution, and handlers to expand their own production, at the expense of other handlers whose supply is fully regulated. A handler who depends entirely upon his own production does not burden the pool with surplus, and

need not be required to equalize, and if he sends unpackaged milk to another handler, applying compensatory payments to it would protect the pool. The own farm production of 92 dealers in Northern New Jersey averaged 1533 pounds daily each, and an exemption of 800 pounds would exempt a large majority of handlers who have such production and receive additional milk from other plants, but would not be large enough to constitute a serious competitive factor in the market. (22 F.R. 3341-3342.)

(c) Most of the milk used in the metropolitan area comes from country plants, only a small part being received from producers delivering milk to processing plants in the area. Handlers receiving milk from country stations must pay, in addition to the price to producers, the additional cost of handling at the country plants. A direct delivery differential for milk delivered directly by producers would tend to equate the handler's cost as compared with the handler receiving milk from country plants. The differential should apply to receiving stations which do not process milk but which are in the area near processing plants; any attempt to vary the amount on the basis of whether processing is done would be meaningless, because competition would force payment of premiums if differentials were applied to only a part of the milk. (22 F.R. 3338.)

(d) The terms and conditions of the recommended order will tend to effectuate the declared policy of the Act. (22 F.R. 3343.)

19. The recommended order contained in the recommended decision included, in Section 927.3, Northern New Jersey as part of the marketing area (22 F.R. 3343); Section 927.65(h)(2), the effect of which is to exempt an average of not over 800 pounds per day of the handler's own production if no milk is received at the plant from other dairy farmers (22 F.R. 3351); and Section 927.71(c), which

Appendix C—*Continued*

provides for direct delivery differentials (of 15¢ per hundredweight for plants in the 31-50 mile zone) which a handler must pay to producers. (22 F.R. 3352.)

20. The decision, signed by the Acting Secretary, was published on June 14, 1957, in the Federal Register. (22 F.R. 4194-4236.) It contains findings similar to those described in Paragraphs (a), (b), (c), and (d) of Finding 18, at 22 F.R. 4195, 4218-4219, 4215, and 4220, respectively, and the provisions described in Finding 19.

21. The order, signed by an Assistant Secretary, to become effective on August 1, 1957, was published in the Federal Register for July 2, 1957. (22 F.R. 4643-4659). It contains a statement that a "hearing was held upon certain proposed amendments to the tentative marketing agreement and to the order regulating the handling of milk in the New York-New Jersey milk marketing area", and a finding, based upon "the evidence introduced at such hearing and the record thereof," that the terms and conditions of the order, as amended, will tend to effectuate the declared policy of the Act. It contains the provisions described in Finding 19.

22. Petitioners have been billed by the market administrator for payments allegedly due under Section 927.65 for milk of their own production in excess of 800 pounds per day, and under Section 927.71(c) for 15¢ per hundredweight on milk received from producers at receiving stations which do not pasteurize or bottle milk.

Proposed Conclusions

The Proposed Conclusions in the Examiner's Report in AMA Docket No. 27-121, mentioned above in the Findings, under the headings "*Adequacy of Notice*" and "*Extension to New Jersey*", on pages 12-16 of that Report, are adopted by reference as parts of the Proposed Conclusions herein.

Appendix C—*Continued*

Own Farm Production. Petitioners argue that there is no authority given by the Act to regulate milk which a handler produces, principally because a producer is not subject to regulation, and the handler does not "purchase" the milk from himself. To show that own production is subject to regulation we need cite only *In re Sunflower Dairy, Inc.*, 15 A.D. 1 (1956) and *In re Acme Breweries, Inc.*, 9 A.D. 1418 (1950), affirmed, *Acme Breweries v. Brannan*, 109 F. Supp. 116 (DCND Calif., 1952).

Although it is indicated that the promulgation record before March 5, 1957, and perhaps older promulgation records not legally before the Secretary in extending Order No. 27 provisions to New Jersey, we think the evidence outlined in Finding 16 authorizes the findings mentioned in Finding 18(b) and the promulgation of Section 927.71(c) as it applies to Northern New Jersey.

Direct Shipment Differential. Petitioners allege that the provision requiring them to pay the charge upon milk received at their receiving stations violates Section 608c(A) of the Act as not providing uniform prices to handlers. That section itself provides that this uniformity is "subject . . . to adjustments for . . . the locations at which delivery . . . is made to such handlers." This contention of petitioners is not well taken.

Petitioners also say that the evidence at the hearing does not support the findings and reasons for the provision, partly because such evidence related rather to processing plants than mere receiving stations. As indicated by Finding 17, much of the testimony did relate to processing plants, but there is definite evidence to support the finding as to receiving stations. We think the record as outlined in Finding 17 supports the findings mentioned in Finding 18(c) and the inclusion of Northern New Jersey in Section 927.71 (b)(2) as promulgated.

Petitioners have not shown that they suffer any hardship

not considered at the promulgating hearing. In this connection, it should be remembered, of course, that the promulgation evidence referred to in the Findings in this decision contain many details and elaborations not shown in the Findings here, and that it is that actual evidence, with all of its ramifications, rather than the outlines or summaries of it here, which is the determining factor. Neither of the petitioners is entitled to exemption from either of the attacked provisions.

Proposed Order

The petitions filed herein, and these proceedings, are dismissed.

Copies hereof shall be served on the parties or their counsel of record, and on the Order No. 27 Market Administrator.

The parties will have until September 3, 1958, to file exceptions hereto, briefs on the exceptions, and requests for oral argument.

JACK W. BAIN

J. W. Bain,
Hearing Examiner.

August 14, 1958.

Appendix C—*Continued*

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:

JACOB TANIS, *et al.*,

IN RE:

IDEAL FARMS, INC., *et al.*,
Petitioners.

AMA DOCKET No. 27-120

AMA DOCKET No. 27-122

REVISION OF REPORT

Within the time allowed, as extended to September 15, 1958, petitioners filed exceptions to the Examiner's Report. Respondent also filed exceptions and requested oral argument.

No revision of the report is deemed necessary because of the exceptions filed.

Copies hereof shall be served on the parties or their counsel.

JACK W. BAIN

Jack W. Bain,
Hearing Examiner.

September 18, 1958.

APPENDIX D

UNITED STATES DEPARTMENT OF AGRICULTURE
BEFORE THE SECRETARY OF AGRICULTURE

IN RE:

JACOB TANIS, IDEAL FARMS, INC.,
FRANKLIN LAKE DAIRY PRODUCERS, INC.,
FRANKLIN LAKE DAIRY, INC.,
PETER N. SANDFORT and GARDEN STATE
FARMS, INC.,

Petitioners.

AMA DOCKET NO. 27-120

DECISION AND ORDER

Preliminary Statement

This is a proceeding under Section 8c(15)(A) of the Agricultural Adjustment Act (1933), as reenacted and amended by the Agricultural Marketing Agreement Act of 1937 and subsequent amendments (7 U.S.C. 601 *et seq.*), involving the validity of a provision of Order No. 27, as amended (7 CFR 927.1 *et seq.*), issued under the act and regulating the handling of milk in the New York-New Jersey milk marketing area. Some of the petitioners are handlers and operate plants subject to the order in the Northern New Jersey portion of the marketing area.

Order No. 27, as amended, contains a scheme whereby each handler pays for milk subject to regulation under the order at class values or prices, differing according to the use he makes of such milk, while producers receive a uniform or blend price based upon the total value of all milk used by all handlers under the amended order. Each handler pays his producers at the uniform price and then, through adjustments with the producer-settlement fund kept by the market administrator, brings the total he has paid to producers up to (by paying money into the pro-

ducer-settlement fund) or down to (by receiving money from such fund) the total he is required to pay at class prices. In effect, a handler receives from the producer-settlement fund the amount by which the value of his milk at the class prices is less than the value at the blend price and pays into the producer-settlement fund the amount by which the value of his milk at the class prices exceeds the value at the blend price.

Petitioners complain of Section 927.65 of the amended order which, in effect, provides, with certain exceptions, for the equalization of milk produced by handlers with the milk of other producers. In short, petitioners allege that the inclusion in the equalization pool, with specified exceptions, of the milk production of producer-dealers, that is, producers who also distribute milk, is invalid. Petitioners contend that the contested provision is not authorized by the act, is not supported by substantial evidence in the promulgation hearing and bears no reasonable relationship to the stabilization of the marketing of milk in the marketing area. An answer to the petition was filed November 15, 1957, by the Acting Deputy Administrator, Agricultural Marketing Service, United States Department of Agriculture. The answer upheld the validity of the disputed provision and the charges to the petitioners resulting therefrom.

A hearing was held in New York, New York, before Jack W. Bain, Hearing Examiner, Office of Hearing Examiners, United States Department of Agriculture, on May 7, 1958. Petitioners were represented by Willis F. Daniels, Attorney at Law, Harrisburg, Pennsylvania, and respondent was represented by John M. Durbin, Office of the General Counsel, United States Department of Agriculture. At the hearing, this proceeding was consolidated with *In re Ideal Farms, Inc., et al.*, AMA Docket No. 27-122. Under Section 900.56 of the rules of practice hearings upon two or more petitions may be consolidated. Jacob Tanis, Franklin Lake

Appendix D—*Continued*

Dairy, Inc., Peter H. Sandfort and Garden State Farms, Inc., withdrew as petitioners in this proceeding. After the hearing, the parties filed briefs. On August 14, 1958, the hearing examiner issued a consolidated report in AMA Dockets Nos. 27-120 and 27-122 containing proposed findings of fact and conclusions and recommending that the petitions be dismissed. Petitioners and respondent filed exceptions to the hearing examiner's report and oral argument was held before the Judicial Officer October 15, 1958. In order to expedite this proceeding (see *United States v. Ideal Farms, Inc.*, 162 F. Supp. 28 (D. N.J. 1958)), and as different issues are involved in this proceeding from those in AMA Docket No. 27-122, a separate decision and order is hereby issued in this proceeding. A decision and order in AMA Docket No. 27-122 will be forthcoming shortly.

Findings of Fact

1. Petitioner Ideal Farms, Inc., is a corporation organized and existing under the laws of the State of New Jersey with its address and principal place of business at 955 Belmont Avenue, Paterson, New Jersey. It is a handler regulated under Order No. 27, as amended, and operates a processing or bottling plant at 960 Belmont Avenue, Paterson, New Jersey, where milk is received and bottled and then distributed on retail and wholesale routes. Ideal Farms, Inc., buys no milk directly from other dairy farmers, but produces milk on farms rented by it and buys milk from other milk plants.

2. Petitioner Franklin Lake Dairy Producers, Inc., is a corporation organized and existing under the laws of the State of New Jersey with its address and principal place of business at Franklin Lake, New Jersey. It is a handler regulated under Order No. 27, as amended, and operates a receiving plant at Wantage, Sussex County, New Jersey. It receives milk there from producers and milk it produces

on its own farms. The milk is checked for flavor, weighed, cooled, held and shipped to the bottling plant of Franklin Lake Dairy, Inc., and other milk plants.

3. Pursuant, in part, to a notice issued February 26, 1957 (22 F.R. 1219), a public hearing was held on a proposal, among others, for amendment of the milk marketing order regulating milk handling in the New York metropolitan area. Some of the evidence bearing on the contested provision adduced at such hearing appears in the paragraph below.

Producer-dealers in general have largely a Class I or fluid utilization of milk. In Northern New Jersey, there are 62 producer-distributors (receiving no milk from others) and 22 dealers with producing farms. They are an important segment of the industry, producing seven percent, or 59,000,000 pounds, of the annual production of milk in the area, with five percent of Class I sales in such area. In view of the number of producer-dealers and their importance, their milk should be pooled with no exemption except for certified milk. Complete exemption would result in a competitive advantage to producer-dealers equal to the difference between the blend price and the Class I price on their Class I sales. A handler with a high fluid utilization would have to make such payments to the pool. Exemption of producer-dealers would open the way to economically unjustified expansion by such handlers due to the competitive advantage resulting from nonregulation. The family-farm type of producer-dealer operation should be exempt from pooling. It should be considered in relation to producers of the same production and not to other handlers. A fixed quantity exemption of a daily average of 1,000 pounds of milk should cover the family-farm type of operation with 50 to 60 cows and such businesses are not sufficiently significant to constitute a serious competitive factor in the marketing area. Handling of more than this

amount or buying from or selling to other producers or handlers should result in pooling of a producer-dealer's entire production. There are 200 or 300 producer-dealers in Northern New Jersey and Upstate New York and pooling their milk with the milk of all other producers would increase the blend price although such price would not be greatly increased thereby. The question of equity between producer-dealers and other producers and handlers is an important consideration. A producer who bottles and sells all his milk but one can and sends that can to a country plant of another handler pools his surplus but does not pool his fluid utilization. Other producers must share in the total market utilization. Custom bottling of milk for a producer and the difficulty of detecting abuses of this practice were discussed as well as other proposals for the regulation of producer-dealers. Such evidence may be found at pages 12970-12973, 14199-14201, 14221-14222, 14431-14432, 14452-14454, 14484-14499, 14469-14474, 14541-14558, 14820-14844, and 15412-15434 of the promulgation hearing record. See also exhibit No. 91 attached thereto.

4. Upon the basis of the evidence introduced at the hearing, the Deputy Administrator, Agricultural Marketing Service, filed a recommended decision May 9, 1957 (22 F.R. 3318), and time was given to file exceptions. A decision by the Acting Secretary of Agriculture was filed June 10, 1957 (22 F.R. 4194) and reads, in pertinent part, as follows:

> "11. *Producer-dealers.* It is concluded that the pricing and pooling provisions of the order should not apply (1) to milk produced on the farm of a handler operating a pasteurizing and bottling plant if no fluid milk is received from any other plant or from dairy farmers, and (2) to milk produced on a handler's own farm up to an average of 800 pounds per day and which is received at a plant opegated by the handler and at which plant milk is received from other plants but not from dairy farmers.

Appendix D—*Continued*

"The production of milk by dealers' own herds in Northern New Jersey totaled 58,527,087 pounds in 1955, or 4.6 percent of the total volume of fluid milk sold in the area. In 1955, a monthly average of 93 producer-distributors produced a monthly average volume of 4,877,257 pounds of milk. Included in this total is the production of one large dealer who produces and distributes approximately 10,000 quarts daily of high butterfat content milk which is sold as a premium milk. This dealer also purchases and distributes milk received from between 170 to 190 dairy farmers and owns and operates a receiving plant which is presently regulated by Order No. 27.

"By excluding the own herd production of this dealer from the average monthly production in 1955, the remaining 92 producer-distributors in Northern New Jersey produced an average of 713 quarts (1,533 pounds) daily. While the record does not indicate the precise number of dealers with own farm production who produced more or less than this average, it does show that a substantial number are dealers with own herd production and who also buy substantial volumes of milk from farmers. It is expected that the volume of own herd milk of these dealers is substantially higher than the average, and accordingly, that the average daily production of the remaining producer dealers, that is, farmers engaged primarily in production and in the distribution of their own milk, is substantially less than the average for the entire group of 92.

* * * * * * *

"The receipts of milk from a handler's own farm is completely exempt from equalization under the order at the present time and the volume of such milk is relatively small. In the Upstate New York and Northern New Jersey areas, however, there are a large number of dealers with own farm production and the volume of such milk is larger in relation to total fluid sales. Dealers with own farm production in the Upstate New York and Northern New Jersey areas at present are in competition with dealers buying milk from producers for which no minimum price was established or for

which the dealer now pays the Class I-C price. Upon extension of the area, however, dealers in these areas will be required to pay the Class I-A price for milk in fluid use. This will materially increase the competitive advantage accruing to dealers with own farm production if such production continues to be fully exempt from equalization. Such advantage would constitute an unwarranted incentive for additional producers to engage in distribution and for the expansion of own farm production by those presently engaged in distribution at the expense of other handlers whose entire supply of milk is fully regulated.

"Handlers who depend entirely upon their own production as a source of supply and who do not burden the pool with any surplus or excess supplies should be subject to the order only to the extent that they must submit reports to the market administrator as required and make available to the market administrator accounts, records and facilities, so that the market administrator may verify the reports submitted.

"Since the own farm production of 242 out of a total of 313 dealers in Upstate New York averaged 235 quarts (about 500 pounds) in 1955 and since the own farm production of 92 dealers (which includes large as well as small dealers) in Northern New Jersey averaged 713 quarts (about 1,533 pounds), it appears that an exemption of own farm production up to 800 pounds per day in the case of handlers who receive no milk from other dairy farmers but who may receive milk from other plants will exempt from regulation a large majority of producer-dealers, and at the same time not be sufficiently large to constitute a serious competitive factor in the marketing area.

"Any handler with own farm production and who purchases milk from other dairy farmers would have the obligation of accounting to the pool for such milk and of paying such other farmers. Consequently, such a handler could not be fully exempt from regulation even though his own production did not exceed 800 pounds.

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Appendix D—*Continued*

"Exceptions were submitted to the failure to provide for quota exemption from pricing and pooling for all handlers with own farm production regardless of whether milk is received by the producer-handler from other plants or from dairy farmers. Such a quota would be based on operations during a past period. This type of exemption appears to constitute unwarranted discrimination against those not in operation prior to the effective date of such a provision." (22 F.R. 4218-4219.)

5. The order amending Order No. 27, as amended, was issued by the Assistant Secretary of Agriculture June 27, 1957. (22 F.R. 4643.) The amending order reads, in pertinent part, as follows:

"§ 927.65. *Net pool obligation of handlers.* The handler's net pool obligation shall be computed pursuant to paragraphs (a) through (g) of this section: *Provided*, That milk specified in paragraph (h) of this section shall be eliminated from this computation and such milk shall be deemed to be excluded by the phrase 'milk received from producers' as such phrase is used in this section and in §§ 927.43, 927.66, 927.79, 927.81, 927.82, and 927.90.

* * * * * * * *

"(h) Milk specified in subparagraph (1) through (3) of this paragraph shall be excluded from the computation of the handler's net pool obligation pursuant to this section.

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"(2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.

"(3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant."

Appendix D—*Continued*

6. Pursuant to the provisions of the order, the market administrator billed petitioners for payments due the producer settlement fund for milk of their own production. Such billings have been paid under protest and petitioner Ideal Farms, Inc., claimed and received an exemption of 800 pounds of milk a day pursuant to Section 927.65(h) of the order.

Conclusions

I

The sole issue in this proceeding is the validity of the requirement contained in Section 927.65 of the amended order (7 CFR 927.65) that, under specified circumstances, a handler equalize milk which he produces with the milk of other producers. Section 927.65 sets forth in detail the manner of computing each handler's net pool obligation and excludes therefrom milk "received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants." Petitioner Ideal Farms, Inc., receives and distributes in excess of a daily average of 800 pounds of milk from farms it rents and also receives milk from other handlers. Franklin Lake Dairy Producers, Inc., receives milk from other producers as well as its own farm production.

Petitioners complain of the failure of the order to eliminate completely milk produced on their farms in computing their obligations to the producer-settlement fund. They contend that the amended order is invalid because the equalization of a handler's own farm production is not authorized by the act and, because even if authorized, Section 927.65 of the amended order is not supported by substantial evidence in the promulgation hearing upon which it was based.

Appendix D—*Continued*

The Secretary is empowered by Section 8c(1) of the act (7 U.S.C. 608c(1)) to issue and amend orders applicable to processors, associations of producers, and *others engaged in the handling* of specified argricultural commodities. (See also Section 8b of the act.) Aside from the requirement that the handling to be regulated must be in the current of interstate or foreign commerce or directly burden, obstruct or affect interstate or foreign commerce in the regulated commodity, no restrictions upon the term "handling," except as specified in Section 8c(13)(A) and (B) (7 U.S.C. 608c(13)(A) and (B)), are contained in the act. Section 8c(13)(A) exempts retailers of agricultural commodities in their capacity as retailers, except in the case of milk and its products, and Section 8c(13)(B) provides that no order under the act shall be applicable to any producer in his *capacity as a producer*. This latter subsection does not bar the regulation of a producer while he is operating in some other capacity, that is, when he is doing something to or with milk other than processing it. *Acme Breweries v. Brannan*, 109 F. Supp. 116, 118 (N.D. Calif. 1952).

The recognition in the statute that a producer of a regulated commodity may also be a handler of such commodity under the act [1] and the failure specifically to exempt therein producers who are also handlers from regulation while operating in such latter capacity indicate that "producer-handlers" are within the purview of the statute and are included in the term "handler" contained therein. The only limitation is that such handlers may not be regulated in their producer capacities. Clearly, the processing or distribution of milk constitutes the "handling" of milk and the performance of such functions by a producer is not in his producer capacity. See, *e.g. Acme Breweries v. Brannan, supra.* See also *United States v. Wrightwood Dairy Company*, 315 U.S. 110 (1942).

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[1] See Sections 8c(5)(C) and 8c(13)(B) of the act.

Appendix D—*Continued*

Furthermore, it is clear from the legislative history of the statute that Section 8c(13)(B) was not intended to exclude from coverage of the act producers who engage in the commercial processing and distribution of the agricultural commodity produced by them.[2] *In re Acme Breweries, Inc.*, 9 A.D. 1418 (1950), *aff'd*, 109 F. Supp. 116 (N.D. Calif. 1952). The real issue in this controversy is, then, whether the statute authorizes the regulation of handlers who are also producers in the *manner* provided in the contested order.

Petitioners refer to Section 8c(5)(C) of the act (7 U.S.C. 608c(5)(C)) in support of their contention that producer-handlers may not be required under the act to equalize their own farm production. Section 8c(5)(C) of the act provides as follows:

> "In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers *(including producers who are also handlers)*, to the end that the total sums paid by each handler shall equal the value of the milk *purchased* by him at the prices fixed in accordance with paragraph (A) of this subsection." [Emphasis supplied.]

Petitioners stress the word "purchased" and contend that they do not "purchase" the milk they produce. They argue that a purchase may only be effected where ownership, control or possession of milk passes from one person to another by some arrangement, contract or agency. Petitioners would construe the disputed term so as to require that milk be passed from one person to another to effectuate a purchase for the purposes of Section 8c(5)(C) of the act.

As can be seen, Section 8c(5)(C) authorizes a method of making adjustments in payments among handlers *including*

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[2] Hearing on H.R. 5585, 74th Cong., 1st Sess., pp. 14, 27, 44, 54, 110, 234, 239, 376 and 382.

Appendix D—*Continued*

producer-handlers. Petitioners dispose of the parenthesis referring to producer-handlers by the explanation that this was included merely to make it clear that producer-handlers could be made to equalize on milk *purchased from other producers*. If this were all that was intended it seems hardly necessary to have included the parenthesis since a handler who purchased milk from producers would clearly be covered as a handler with respect to such milk whether or not he might be a producer-handler with respect to milk of his own production. A sounder construction is that the parenthesis is contained in Section 8c(5)(C) to reach a producer-handler, that is, a person who handles, or distributes, milk which he himself produces.

The text of the act itself, then, by including producer-handlers as handlers who may be required to equalize, indicates that the word "purchased" was not intended to have the limited meaning ascribed to it by the petitioners. The word "purchased" conveys a wide variety of meanings (see *e.g., United States v. Rock Royal Cooperative, Inc.*, 307 U.S. 533 (1939)),[3] and the proper scope to be accorded it in a given case depends upon the circumstances in which it is employed. See, *e.g., United States v. American Trucking Association, Inc.*, 310 U.S. 534, 542-543 (1940); *R. H. Johnson & Co. v. Securities & Exchange Commission*, 198 F.2d 690, 696 (2d Cir. 1952), *cert. denied*, 344 U. S. 855 (1952); *Irwin v. Simmons*, 140 F.2d 558, 560 (2d Cir. 1944); *Andrews v. Commissioner of Internal Revenue*, 135 F. 2d 314, 317 (2d Cir. 1943), *cert. denied*, 320 U.S. 748 (1943).

The Congress was not seeking to solve the variant economic problems in the field of milk marketing by solutions rigidly limited to a code of specifics or by ascribing narrow and sterile meaning to the terms of its enactment. *United States v. Rock Royal Cooperative, Inc., supra; Queensboro*

[3] See also Webster's New International Dictionary, 2d ed. (1950); Funk & Wagnalls, New Standard Dictionary (1929).

Appendix D—*Continued*

Farm Products, Inc. v. Wickard, 137 F.2d 97 (2d Cir. 1944); *Bailey Farm Dairy v. Anderson*, 157 F.2d 87 (8th Cir. 1946), *cert. denied*, 329 U.S. 788 (1946); *In re Beatrice Foods Co.*, 15 A.D. 767 (1956), *aff'd*, N.D. Okla. Feb. 25, 1957, 16 A.D. 177 (1957). The disputed word was construed by the United States Supreme Court in *United States v. Rock Royal Cooperative, Inc., supra*, to mean "acquire for marketing" where an agency type of cooperative association of producers was contending that it did not purchase the milk of its principals.

The element of transfer of title, possession and control from seller to buyer has been eliminated from the disputed word under the factual situation present in the *Rock Royal* case and we know of no reason why passage of possession or control from one *entity* to another should be required. The common denominator for purposes of regulation established in the act is the *capacity* in which a business entity operates and not the entity. It is recognized that the same person or entity may be engaged in the milk business in more than one capacity (see Sections 8c(13)(A) and (B) and 8c(5)(C); see also *Acme Breweries v. Brannan, supra*), and only while operating as a handler is the entity regulated under the act. The explicit recognition that a producer may also be a handler leads to the conclusion that when operating as a handler he may "purchase" or "acquire for marketing" milk which he has produced in his capacity as a producer. Petitioners, as unregulated producers, delivered milk to the regulated entity, as do all other producers. Cf. *United States v. Rock Royal Cooperative, Inc., supra.*

Petitioners' construction would mean that there is no power in the Secretary under the act to make any provisions in an order requiring equalization by producer-handlers of milk of their own production. This construction would free such handlers from the burden of carrying the market surplus on milk they produce under any and all circumstances,

Appendix D—*Continued*

unlike other producers and handlers in the market. Petitioners advocate, in effect, that producer-handlers equalize the milk they receive from other producers but that they be freed from such burden with respect to their own production. The statute evidences no intent to distinguish in this regard and the legislative history thereon fails to support such construction.[4] On the contrary, equal treatment of all proprietary handlers appears to have been contemplated.[5] Moreover, the statutory provision for equalization of the burdens of surplus could be rendered ineffective by the exclusion of the production of producer-handlers in a market where such handlers represent a sizeable percentage of the total milk marketed. Cf. *Elm Spring Farm, Inc. v. United States*, 127 F.2d 920, 927 (1st Cir. 1942).

The reasons stated by the Court for its conclusion in the *Rock Royal* case were that no specific exemption was provided in the statute for the agency type of cooperative as distinguished from the sale cooperative, that the legislative history failed to evidence any intent to provide such exemption and that so to construe the statute would render nugatory the statutory provisions for equalization of the burden of surplus. To construe the disputed term nar-

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[4] "Subsection (5) of the proposed Section 8c states specifically the terms which may be included in orders relating to milk and its products. These terms follow the methods employed by cooperative associations of producers prior to the enactment of the Agricultural Adjustment Act *and the provisions of licenses issued pursuant to Section 8(3) of the Agricultural Adjustment Act.*" [Empsasis supplied.] Report of House Committee on Agriculture, p. 9, Report No. 1241, 74th Cong., 1st Sess.; Report of Senate Committee on Agriculture and Forestry, p. 9, Report No. 1011, 74th Cong., 1st Sess. Some licenses referred to equalize a producer-handler's own milk production. See, e.g., Amended License for Milk, Chicago, Illinois, Sales Area, License #30, issued December 1, 1934. See also Black, The Dairy Industry and the AAA (Brookings 1935), pp. 112, 126.

[5] Hearing on H.R. 5585, 74th Cong., 1st Sess., pp. 27-28, 44, 51; 79 Cong. Rec. 11138 (1935).

rowly, as advocated by petitioners, would ignore the failure of the courts so to construe it, the legislative intent, the consequences resulting from such construction, and would unwarrantedly limit the parenthetical statement including producer-handlers. It is concluded on the basis of such considerations and the regulatory scheme established in the act that Section 927.65 of the amended order is authorized by the statute and requires petitioners to equalize their own farm production.[6] See also *In re Sunflower Dairy, Inc.*, 15 A.D. 1 (1956).

II

Petitioners next contend that the disputed provision of the order, that is, Section 927.65, is not supported by evidence in the promulgation hearing upon which it was based[7] and bears no reasonable relationship to stabilizing

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[6] Petitioners rely upon *Dairymen's League Cooperative Ass'n, Inc. v. Brannan*, 173 F.2d 57 (2d Cir. 1949), cert. denied, 338 U.S. 825 (1949), in support of their position. The Dairymen's League case involved, in part, the movement of cream from one plant of a handler to another plant of the same handler and it was concluded therein that such cream was not thereby delivered for classification purposes to a purchaser. A different construction in such case would have been contrary to the purposes of the *order* provision under consideration. Moreover, the handler was operating in the movement of cream involved therein in its capacity as a handler, unlike the present situation. For this and other reasons the Dairymen's League case is clearly distinguishable from the matter in issue. The other cases cited by petitioners are not considered to be persuasive.

[7] The evidence adduced, and the matters received in evidence, prior to March 5, 1957, have not been considered in determining the sufficiency of evidence for the contested provision in view of the hearing examiner's ruling in the companion case, In re Ideal Farms, Inc., et al., AMA Docket No. 27-122. This does not constitute a determination on such ruling. Such issue was not raised in the petition and we are of the opinion that such a determination is unnecessary for decision herein. In order to expedite this proceeding, we have refrained from considering this issue.

the marketing area as the market is not disorderly or unstable.

As seen from Finding of Fact 3, the necessity for some regulation of producer-distributors was clearly presented at the hearing. The hearing record indicates that producer-dealers in general have largely a Class I or fluid utilization of milk. The number of producer-distributors in Northern New Jersey represent an important segment of the milk industry there and the volume of milk produced by such handlers is relatively substantial. Absent regulation of producer-dealers, they would enjoy a competitive advantage over other handlers equal to the difference between the blend price and the Class I price on their Class I sales. Such advantage would have an important bearing on the equity of costs to handlers. In addition, other producers receive only the blend price for their milk while producer-dealers, in the absence of regulation, would not have to equalize their production and thereby carry part of the burden of surplus. It was recognized, at the hearing, that exemption of producer-distributors from regulation would open the way to unwarranted expansion by such distributors and that unfair advantage could be taken of the market-wide pool at the expense of other producers and handlers. The problem of what to do by way of regulation of producer-dealers under the proposed amendment was unmistakably presented by the hearing record as was the necessity for such regulation. Several proposals for the regulation of producer-dealers were considered. They ranged from no exemption from regulation for such handlers except those producing and distributing certified milk, to in effect, exemption of those producer-dealers in existence on a fixed date prior to the hearing or partial exemption up to 85 percent of Class I utilization for producer-dealers, and included a proposal for the exemption from pooling of a fixed quantity of producer-dealer milk where such handler did not receive milk from other producers or sell milk to

other handlers. Concern was expressed for the family-farm type of dairy business and the fixed quantity exemption proposal was meant to cover such businesses. That type of operation was not thought to be sufficiently significant to constitute a serious competitive factor in the marketing area. It is concluded, in light of the expertise of the Secretary, that the evidence in the record could legally form the basis for the judgment of the Secretary reflected in the contested provision. Cf. *Railway Express Agency, Inc. v. Civil Aeronautics Board*, 243 F.2d 422 (D.C. Cir. 1957); *In re The Lawson Milk Company*, 17 A.D. 239 (1958). (See also Finding of Fact 4.)

Moreover, Section 927.65 constitutes a valid and reasonable exercise of administrative discretion.[8] It was anticipated that complete exemption from regulation of dealers with own-farm production would materially increase the competitive advantage thereby accruing to such dealers. Such advantage would be a great incentive for additional producers to engage in distribution and for the expansion of own-farm production by those engaged in distribution at the expense of other handlers whose entire supply of milk was fully regulated and would operate to the detriment of the market-wide pool. Of necessity, rule-making must look to the future and attempt to anticipate problems and protect

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[8] "The background and legislative history of the Agricultural Marketing Agreement Act of 1937, as amended, leave no doubt that Congress gave the Secretary broad discretion in its administration." *Queensboro Farm Products, Inc. v. Wickard*, 137 F.2d 969, 977 (2d Cir. 1943.) The "terms of the Order are largely matters of administrative discretion" and the technical details "are left to the Secretary and his aides." *Stark v. Wickard*, 321 U.S. 288, 310 (1944). The responsibility of selecting the means of achieving the statutory policy and the relationship between the remedy and policy are peculiarly matters for administrative competence. *American Power & Light Co. v. Securities & Exchange Commission*, 329 U.S. 90, 112 (1946); *Secretary of Agriculture v. Central Roig Refining Co.*, 338 U.S. 604, 613-614 (1950).

against foreseeable eventualities. Cf. *Railway Express Agency, Inc. v. Civil Aeronautics Board, supra; American Airlines, Inc. v. Civil Aeronautics Board;* 192 F.2d 417 (D.C. Cir. 1951). The formula employed by the Secretary to meet the problem of producer-dealers described in the promulgation hearing was reasonable and appropriate to a permissible end. It attempted to maintain equity among similar handlers and producers, increased the blend price and was designed to protect the integrity of the regulatory scheme established in the order. Existing market instability is not the sole criterion for regulation.

In conclusion, the contested provision is authorized by the act, is supported by substantial evidence and constitutes a reasonable exercise of administrative discretion. The petition should be dismissed.

All contentions of the parties presented for the record have been considered and whether or not specifically mentioned herein, any suggestions, requests, etc., inconsistent with this decision are denied.

Order

In view of the foregoing, the relief requested by the petitioners is denied and the petition is dismissed.

Copies hereof shall be served upon the parties and the market administrator for Order No. 27, as amended.

THOMAS J. FLAVIN

Judicial Officer.

Done at Washington, D. C., Nov. 10, 1958.

APPENDIX E

Opinion of the United States District Court for the District of New Jersey

(Filed February 10, 1960)

WORTENDYKE, *District Judge:*

Each of these cases is before this Court pursuant to the provisions of subsection 15(B) of Section 8c, (7 U.S.C.A. § 608c(15)(B),) of the Agricultural Adjustment Act of 1933, as amended, re-enacted and amended by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C.A. § 601, et seq., hereinafter referred to as the Act. The cases have been consolidated here because they arise from consolidated proceedings in the Department of Agriculture, Dockets A.M.A. 27-120 and 27-122. Plaintiffs complain of the action of the defendant, by his Judicial Officer, hereinafter referred to as Secretary, in dismissing plaintiffs' petitions, filed under subsection 15(A) of the Act, to revoke certain sections of Milk Marketing Order No. 27, promulgated by the Secretary on June 10, 1957 to take effect August 1, 1957. In A.M.A. 27-120 below, plaintiffs named in Civil 1295-58 here, attacked the validity of section 927.65 of Order No. 27 "insofar as it requires the milk of producer-distributors to be equalized for those located in Northern New Jersey." In A.M.A. 27-122 below, plaintiffs named in Civil 98-59 here, attacked sections 927.3, 927.40 and 927.71 of the same Order "insofar as they include any part of Northern New Jersey in the Marketing Area" of the Order. The record of the proceedings before the Hearing Examiner and Judicial Officer of the Department comprises some 16,000 typewritten paggs, exclusive of pleadings and exhibits. While the section, 15(A) proceedings were still pending before the Secretary, Ideal Farms, Inc., prematurely urged, in opposition to the Government's

action to compel its compliance with section 927.77 of the same Order (No. 27), its present contentions of administrative procedural irregularity in the adoption of the Order, and lack of statutory authority for the Order's requirement that handlers who are also producers make payment to the Producers Settlement Fund based upon so much of the milk handled by them as they obtain from their own farms. See *United States v. Ideal Farms, Inc.*, D.C. N.J. 1958, 162 F.Supp. 28, affd. 3 Cir. 1958, 262 F.2d 334.

Plaintiffs in both actions are New Jersey corporations. In the earlier, hereinafter called No. 1295, the plaintiffs are two in number, Ideal Farms, Inc., referred to as Ideal, and Franklin Lakes Dairy Producers, Inc., referred to as Franklin Lakes. In the other action, No. 98, these two plaintiffs are joined by two others, Garden State Farms, Inc., called Garden State, and Ideal Farms Dairy Products, Inc., referred to as Ideal Products. All plaintiffs operate in the northern part of New Jersey, which area was, for the first time, by the provisions of the Order as amended, made a part of a Milk Marketing Area. Ideal is a milk handler, as defined in § 608c(1) of the Act and in § 927.7 of the Order. That corporation operates a processing and bottling plant in Paterson, New Jersey, from which milk is distributed to retail and wholesale purchasers. Ideal buys no milk from other dairy farmers or producers, but does handle and sell milk produced on farms which it rents, and also buys milk from other milk plants. Franklin Lakes is also a milk handler, operating a milk receiving plant in Wantage, New Jersey, where it collects milk from dairy farms owned by others, together with milk produced on its own farms, and thereafter sells it to other handlers. Ideal Products is a handler of milk which it buys from producers and sells to other handlers. Garden State is a handler which receives milk from producers and other handlers, processes, bottles and sells it to purchasers within the marketing area defined in Order No. 27.

Appendix E—*Continued*

All of the plaintiffs complain of alleged denial of due process in the administrative proceedings which resulted in the adoption of the Order, and Ideal and Franklin Lakes contend that the provisions of § 927.65 of the Order, insofar as they may be construed to require the pooling and pricing of milk moved to a handler's plant from such handler's own farms, are not authorized by the Act and find no support in the evidence before the Secretary.

Because they involve similar questions of law, these cases have been consolidated (Rule 42(a) F.R.C.P.), and, because no genuine issues of material fact appear, the purely legal questions raised by the pleadings are presented by cross-motions for summary judgment under F.R.C.P. 56. See *Wawa Dairy Farms v. Wickard,* 3 Cir. 1945, 149 F.2d 860.

Plaintiffs' contentions are stated in their consolidated brief on these motions, as follows:

> (1) "Imposition of section 927.3, and section 927.65 of Order No. 27 upon the north Jersey area and these plaintiffs is invalid in that there was a lack of due notice of the hearing and improper use of the record by the Secretary as well as improper rulings and orders by the hearing examiners and the Judicial Officer."
>
> (2) "Pooling and pricing regulations of handlers' own farm production is beyond the authority granted to the Secretary of Agriculture by the statute."

Order No. 27 as originally promulgated by the Secretary on August 5, 1938, covered the New York metropolitan milk marketing area (7 C.F.R. § 927.1-927.89 Rev. 1952) and established "a formula under which distributors of milk thereby regulated account to producers at a minimum price which varies according to the geographical area in which the milk is delivered to the purchaser by the distributor." Fahy, J., in *United Milk Producers of New Jersey v. Benson, Secretary, etc.,* D.C. Cir. 1955, 225 F.2d 527, 529. As stated in the cited case, the basic purpose of milk marketing orders pro-

Appendix E—*Continued*

mulgated and administered under the Act is "to stabilize the price of milk, in aid of both producers and distributors or handlers, and to maintain orderly marketing conditions." *United States v. Rock Royal Cooperative, Inc.*, 1939, 307 U.S. 533, and *H. P. Hood & Sons, Inc. v. United States*, 1939, 307 U.S. 588, are there cited as upholding the validity of the Act and of particular marketing orders made pursuant thereto. No impropriety in the administrative proceedings which promulgated the Order was asserted or considered in the *United Milk Producers* case, *supra*.

By the provisions of the Act, 7 U.S.C.A. § 608c(1) and (2), the Secretary is directed not only to issue, but from time to time to amend orders applicable to persons engaged in the handling of milk (handlers) in the current of or which directly burdens, obstructs or affects interstate commerce. Subdivision (3) of the same subsection directs that the Secretary, whenever he has reason to believe that the issuance of an order will tend to effectuate the declared policy of the Act with respect to milk, "shall give due notice of an opportunity for a hearing upon a proposed order."[1] Section 608c(11) prohibits issuance of an order relating to a commodity which is applicable to all production or marketing areas, or both, unless the Secretary finds that "the issuance of several orders applicable to the respective regional production areas or regional marketing areas, or both, as the case may be, of the commodity * * * would not effectively carry out the declared policy" of the Act.

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[1] The policy of Congress is declared in 7 U.S.C.A. § 602, and is summarized in *United States v. Rock Royal Cooperative, Inc.*, 1939, 307 U.S. 533, 574, as being "to establish and maintain such orderly marketing conditions for agricultural commodities in interstate commerce as will establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy equivalent to the purchasing power of agricultural commodities in the base period * * *." (August 1909 to July 1914 or August 1919 to July 1929.)

Appendix E—*Continued*

Plaintiffs base their assertion that their inclusion in the Order, by the provisions of § 927.3 thereof, is illegal upon the alleged insufficiency of notice to them that the scope of the Secretary's hearing might include the consideration of an amendment or revision of the existing Order No. 27 to extend its regional coverage to northern New Jersey. Such contention is without support in law or fact. The record of administrative proceedings in each of these cases discloses adequate compliance with 5 U.S.C.A. § 1003 and with part 900.4 of Title 7, Code of Federal Regulations relating to Agricultural Marketing Agreements and Orders.[2]

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[2] Section 4(a) of the Administrative Procedure Act, 5 U.S.C.A. § 1003(a) provides:

"(a) General notice of proposed rule making shall be published in the Federal Register (unless all persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law) and shall include (1) a statement of the time, place, and nature of public rule making proceedings; (2) reference to the authority under which the rule is proposed; and (3) either the terms or substance of the proposed rule or a description of the subjects and issues involved. Except where notice of hearing is required by statute, this subsection shall not apply to interpretative rules, general statements of policy, rules of agency organization, procedure or practice, or in any situation in which the agency for good cause finds (and incorporates the finding and a brief statement of the reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest."

Section 7 of the Administrative Procedure Act, 5 U.S.C.A. § 1006, provides:

"In hearings which Section 1003 or 1004 of this title requires to be conducted pursuant to this section • • • (c). Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, • • • and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable probative, and substantial evidence. • • •"

Appendix E—*Continued*

In his statement of principles on proposed new milk marketing regulation in the New York-New Jersey area, published December 31, 1955 (20 F.R. 10167), the Secretary invited interested parties to submit proposals for embodiment either in a single order covering both areas or in a separate order for New Jersey alone. On May 25, 1956 there was published (21 F.R. 3537) a notice of hearing on proposals for a separate new milk marketing order for northern New Jersey. This notice was supplemented by one published June 6, 1956 (21 F.R. 3799), which announced that the subject matters of the hearing would be the handling of milk in the New York Metropolitan Milk Marketing Area and a proposed marketing agreement and order regulating the handling of milk in the Northern New Jersey Milk Marketing Area. The noticed hearing was convened at Newark, New Jersey, on June 18, 1956, and during its course a motion was made to expand the agenda to include consideration of a comprehensive order to combine regulation of milk handling in metropolitan New York and in northern New Jersey. This motion, after argument, was denied by the Secretary on June 25, 1956. The hearings under the original notice continued intermittently until recessed on December 20, 1956, but they were reconvened March 5, 1957, in New York City, pursuant to notice of call by the hearing examiner, duly published in the Federal Register on February 27, 1957 (22 F.R. 1128). A press release issued by the Secretary February 21, 1957, announcing that the reconvened hearing would be open for submission of evidence on a single marketing order for the Metropolitan New York-Northern New Jersey Areas was confirmed by a supplemental notice of hearing published in the Federal Register on February 28th (22 F.R. 1219). Motions attacking the timeliness and propriety of the latter notice were made to and overruled by the hearing examiner on March 5, 1957, and the hearings continued for

eighteen more days, with participation therein by the present plaintiffs and their attorneys, until concluded on March 29, 1957.

Section 900.4 of Rules and Regulations adopted by the Secretary pursuant to Section 10(c) of the Act (7 C.F.R. 900.4) requires that "[t]he notice of hearing shall contain a reference to the authority under which the marketing agreement or marketing order is proposed; shall define the scope of the hearing as specifically as may be practicable; shall contain either the terms or substance of the proposed marketing agreement or marketing order or a description of the subjects and issues involved and shall state the industry, area, and class of persons to be regulated, the time and place of such hearing, and the place where copies of such proposed marketing agreement or marketing order may be obtained or examined. The time of the hearing shall not be less than 15 days after the date of publication of the notice in the Federal Register, * * * unless the Deputy Administrator shall determine that an emergency exists which requires a shorter period of notice, in which case the period of notice shall be that which the Deputy Administrator may determine to be reasonable in the circumstances: Provided, That, in the case of hearings on amendments to marketing agreements or marketing orders, the time of the hearing may be less than 15 days but shall not be less than 3 days after the date of publication of the notice in the Federal Register." (See also footnote 2 *supra*). It appears to be the contention of the plaintiffs that the entire Order No. 27 is invalid as to them because (a) they had insufficient notice that the contemplated regulation of milk marketing for nothern New Jersey would be achieved by a territorial enlargement of the scope of the existing New York metropolitan order of the same number, instead of the originally contemplated separate order for the New Jersey area, and (b) the provisions of the single

comprehensive order, of which they presently complain, cannot legally derive support from evidence adduced upon hearings held pursuant to the original notice of May 18, 1956, and (c) they were precluded from presenting evidence upon the hearings which reconvened on March 5, 1957, which might have exempted them from the impact of the comprehensive order insofar as it required handlers to account to the producer settlement fund for milk which they produce upon their own farms. In short, plaintiffs insist that the hearing noticed on February 27, 1957 was a promulgation hearing, contemplating a new regulatory project rather than an amendment or modification of that scheme of regulation which had been under consideration by the Secretary since his published statement of December 15, 1955, and hearing notice of May 18, 1956. Plaintiffs' attack upon the Order as a whole is obviously in aid of that upon the provisions of § 927.65 thereof which the plaintiffs contend are beyond the authority delegated by the Act "insofar as this Section attempts to require the pooling and pricing of milk moved to a handler's plant from such handler's own farm". (plaintiffs' brief, p. 32). We shall examine plaintiffs' contentions in the order of their statement of the legal questions which they present.

Sufficiency of Notice

The supplemental notice of hearing published February 28, 1957, to be convened March 5, 1957, for the first time announced the Secretary's intention to regulate northern New Jersey by a comprehensive order including metropolitan New York, whereas 12,000 pages of testimony had by then been taken at 84 sessions in contemplation of embodying the New Jersey regulation in a separate order. The notice of February 28, 1957 also announced that support for the proposed comprehensive order would be sought in the evidence already presented, as well as in that to be

taken pursuant to the hearing there noticed. Because the comprehensive order for the first time placed under regulation thousands of New Jersey milk producers and hundreds of New Jersey milk handlers, it is plaintiffs' insistence that the supplementary notice of February 28 must necessarily have constituted a call for a "promulgation" hearing for March 5, not a hearing upon a proposed amendment, and that such notice, being less than the fifteen day minimum prescribed by Section 900.4 of the Rules and Regulations under the Act, was inadequate and therefore rendered the subsequent order invalid. We cannot agree with this conclusion.

On May 25, 1956 notice was published in the Federal Register that public hearings would be held, commencing June 18, 1956, "for the purpose of receiving evidence with respect to the economic and marketing conditions relating to the handling of milk in a proposed Northern New Jersey milk marketing area." (21 F.R. 3537). Among the provisions proposed for inclusion in the Order referred to in the notice were the following:

> (1) "Handler" is defined as "any person who engages in the handling of milk or products therefrom, which milk was received at a pool plant, or at a plant approved by any health authority as a source of milk for the marketing area." (§ 927.7, 21 F.R. 3559), (§ 7, 21 F.R. 3545).
>
> (2) The market administrator is required to compute "the value of milk of producers disposed of by each handler." (§ 990.61, 21 F.R. 3540).
>
> (3) Each handler is required to make payment to each producer, each month, for all milk delivered to him by such producer during the preceding month at not less than the uniform price (subject to certain differentials). (§ 927.65, 21 F.R. 3568), (§ 65, 21 F.R. 3553).

Appendix E—*Continued*

(4) Each handler is required to pay his debit balance monthly to the producer settlement fund in accordance with his account therewith. (§ 927.72, 21 F.R. 3569), (§ 73, 21 F.R. 3554).

A comparison of each of the foregoing provisions with certain of those in the existing (metropolitan New York) order reveals striking instances of similarity. The existing Order No. 27 indicates:

(1) "Handler" is defined in identical language. (§ 927.7)

(2) Each handler's pool debit or pool credit shall be computed by the market administrator by multiplying "the quantity of milk received by each handler from producers by the uniform price." (§ 927.79(a).)

(3) Each handler is required to make payment to each producer each month for all milk delivered by such producer during the preceding month at not less than the uniform price (subject to certain differentials). (§ 927.70.)

(4) Each handler is required to pay his debit balance monthly to the producer settlement fund in accordance with his account therewith. (§ 927.77.)

Thus, from May 25, 1956 until the hearings terminated on March 29, 1957, plaintiffs were upon full and continuing notice that they were to be subjected to the foregoing regulations, and were accorded plenary opportunity to produce evidence in opposition to the contemplated imposition thereof, and to cross-examine witnesses called by the proponents of such regulations. Whether the order in which such regulations would be incorporated was to be a separate one for northern New Jersey, or an enlargement of the scope of the existing order covering metropolitan New York was immaterial insofar as the impact of the regulations upon the plaintiffs was concerned. The record fails

to disclose that the change in the vehicle selected, during the course of the hearings, for the promulgation of such regulations, in any degree more adversely affected, or could affect, the plaintiffs than would similar regulations embodied in a separate order. The supplementary notice of February 28, 1957 of the reconvening of the hearings on March 5, 1957, which had been recessed on December 20, 1956, was merely an amendment of the proposed form (not substance) of the order referred to in the original notice of May 25, 1956. The supplementary notice was within the time prescribed by the Secretary's Regulations, but if it were not to be so construed, the record discloses no prejudice to plaintiffs by reason thereof. As plaintiffs correctly point out, "until March 5, 1957, all the testimony and exhibits which pertained to the North Jersey problem were offered in support of or in opposition to the proposed provisions" of the order to be issued for New Jersey alone, and "upon this basis • • • the hearing proceeded through 84 sessions." The amplitude of notice of and opportunity to oppose the Secretary's obvious intention to regulate the marketing of plaintiffs' "own farm" milk was clearly apparent and available to plaintiffs, at least as early as May 25, 1956. Although the hearing examiner concluded that the hearing notice of May 18, 1956 limited the issue to that of whether or not "a separate new milk marketing order (should be adopted) for Northern New Jersey," he recognized that "the desirability of a comprehensive order could • • • be shown in support of a contention that there should not be a separate order," that much testimony had been received for this purpose prior to March 5, 1957, and that "the area proposed to be regulated, the general type of regulation, etc., were always the same." Of eight proposals for the regulation of northern New Jersey milk marketing, which were attached to the hearing notice of May 18, 1956, four suggested that "own-produced" milk of handlers

should be subjected to regulation. Administrative due process requires (1) opportunity to be heard, (2) due notice of hearing, (3) fair conduct of hearing, (4) support in the record for the decision, (5) submission of proposed findings in a tentative report, and (6) opportunity to file and be heard upon exceptions to such report. We agree with the conclusion of the Judicial Officer that on the basis of the entire record of the hearing, lasting 102 days, where approximately 16,000 pages of testimony was adduced, and the informal conference, that plaintiffs were afford a reasonable opportunity to prepare and to be heard. See *United States v. Wrightwood Dairy Co.*, 7 Cir. 1942, 127 F.2d 907; *Pearson v. Walling*, 8 Cir. 1943, 138 F.2d 655. The administrative proceedings here under review were fully in accord with the requirements of due process emphasized in *Morgan v. United States*, 1937, 304 U.S. 1.

Use of Entire Record as Basis for Decision

It appears to be plaintiffs' contention that because the hearing held prior to March 5, 1957 were upon a proposed separate milk marketing order for New Jersey, as announced in the notice of May 18, 1956, the 12,000 pages of testimony presented at those hearings should not have been considered by the Judicial Officer in reaching his decision sustaining the comprehensive order proposed in the supplemental notice of February 28, 1957, upon which 4,000 additional pages of testimony were submitted. This criticism could only have validity if the evidence recorded at the earlier hearings was irrelevant to any of the issues considered at the later hearings. The over-all scope of the hearings included consideration of three questions, viz.: (1) whether the northern New Jersey area should or should not be regulated; (2) whether such regulation should be separately imposed or in conjunction with the already regulated metropolitan New York area; and (3) in what pro-

visions such regulation should be expressed. The initial notice of May 18, 1956 set forth eight regulatory proposals, each provision of which became a contested issue from the outset. The basic plan of regulation expressed in each proposal was similar to that ultimately adopted. The proposal of Mutual Federation of Independent Cooperatives, Inc., for example, recommended a separate order for northern New Jersey and a new Order No. 27, with similar provisions to accomplish the same result as the single comprehensive order of which plaintiffs now com[illegible]in. Since the question of the regulation of handlers' "own-produced" milk was an issue from the beginning, plaintiffs' opportunity to cross-examine witnesses called by proponents of the regulation was continuingly available. Their failure, if any, to exhaust the opportunity to cross-examine before the vehicle of the regulatory project was changed to a comprehensive order does not spell out error in the Examiner's refusal to require recall of witnesses for further cross examination. Plaintiffs show no denial of due process in that aspect of the proceedings. The complete record of all of the hearing sessions was an appropriate basis for the ultimate administrative decision. I find no procedural impropriety which invalidates that decision. (See footnote 2 *supra*.)

The Validity of § 927.65 of the Order

As stated in their brief (page 32), the plaintiffs contend that the Act does not authorize the promulgation of § 927.65 (of Order No. 27) insofar as this section attempts to require the pooling and pricing of milk moved to a handler's plant from such handler's own farm. They argue that because Section 8c(5) of the Act (7 U.S.C.A. § 608c(5)) prescribes "milk purchased" by handlers from producers as a factor in fixing minimum prices for and adjustments among handlers of milk, it follows that a milk marketing order may not

Appendix E—*Continued*

"control" handlers' "own farm" milk (which is not "purchased" from producers).

In seeking in § 8c(5) of the Act alone for authority for the provisions of § 927.65 of the Order, plaintiffs improperly disregard other important statutory sections of the enabling legislation. Plaintiffs tacitly, if not expressly, concede that § 927.65 regulates handlers' "own-produced" milk. An examination of that section will indicate the propriety of that concession. In determining the net pool obligation of every handler *all milk received from producers* must be included as a factor. The handler's net pool obligation for each plant is computed as the sum of the products of the quantity of each class of milk received from producers at each pool plant, at the class price, with certain fluid skim differentials, less specified deductions for certain plants. From the computation of the handler's net pool obligation there is excluded (1) milk from certain New York sources; "(2) milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers, but it received from other plants"; and "(3) all milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant."

An example of the application of the foregoing formula for the calculation of the net pool obligation of handlers would appear from the following factual assumptions: We shall assume that Handler A and Handler B are the only handlers operating in their marketing area, and that each handles a monthly quantity of one hundred thousand pounds, all of the same classification. Handler A purchases milk from producers. The class price is $5.00 per cwt., after adjustment for differentials. Assuming no involvement of skim milk, calling for the application of a special computation, the handler's net pool obligation would be $5,000.

Appendix E—*Continued*

Handler B, on the other hand, receives only 75,000 pounds of milk from other producers, producing the remaining 25,000 pounds on his own farms. According to the contention of the plaintiffs in the present case, Handler B's net pool obligation would be but $3,750. The effect of the plaintiffs' contentions upon the computation of the uniform price required to be paid into the producer settlement fund, under these circumstances, as provided by § 927.66 of the Order, would work out as follows: The two handlers would report to the Market Administrator their combined net pool obligation, viz., $8,750.00 (involving the distribution of 200,000 pounds of milk) and assuming that that amount had been paid into the producer settlement fund (disregarding for the moment the items mentioned in subdivisions (b), (c), (d) and (e) of § 927.66), the uniform price per cwt of milk would be the quotient of the aggregate net pool obligation divided by the "total pounds of milk delivered by producers." This would obviously result in $4.375 per cwt in lieu of the $5.00 contemplated by the Order. Because each handler, irrespective of whether he is also a producer and irrespective of the number of producers whose milk he receives and distributes, is required by section 927.70 of the Order to "make payment to each producer for all milk delivered by such producer during the preceding month at not less than the uniform price", it is obvious that an exemption of a dealer's "own farm" milk from calculation of his net pool obligation would reduce the uniform price which all producers are entitled to receive for milk of the same grade, under otherwise similar circumstances. Such a result, although obviously in the financial interest of the handler-producer, is clearly contrary to the purpose and object of the Act.

The most comprehensive review and clearest explanation of the provisions of the Act is to be found in Mr. Justice Reed's opinion in *United States v. Rock Royal Co-*

Appendix E—*Continued*

Operative, Inc., 1939, 307 U.S. 533, which sustained the validity of Order No. 27 when that Order regulated the handling of milk only within the New York metropolitan area. The necessity for and result of providing a uniform minimum price for fluid milk for all of the producers in the marketing area is described therein, at page 550, as follows:

> "The market for fluid milk for use as a food beverage is the most profitable to the producer. Consequently, all producers strive for the fluid milk market. It is obvious that the marketing of fluid milk in New York has contacts at least with the entire national dairy industry. The approval of dairies by the Department of Health of New York City, as a condition for the sale of their fluid milk in the metropolitan area, isolates from this general competition a well recognized segment of the entire industry. Since these producers are numerous enough to keep up a volume of fluid milk for New York distribution beyond ordinary requirements, cut-throat competition even among them would threaten the quality and in the end the quantity of fluid milk deemed suitable for New York consumption. Students of the problem generally have apparently recognized a fair division among the producers of the fluid milk market and utilization of the rest of the available supply in other dairy staples as an appropriate method of attack for its solution. Order No. 27 was an attempt to make effective such an arrangement under the authority of the Agricultural Marketing Agreement Act."

With respect to the provisions of the Order establishing minimum prices for milk, the Court points out, at page 554:

> "That the minimum price each handler should pay for milk is fixed by a formula * * *. The handlers are required to file reports as to their receipts and utilization of milk of the various classes. It should be understood, however, that this minimum price is not the amount which the producer receives but the price level or so-called 'value' from which is calculated the actual amount in dollars and cents which he is to receive.

Appendix E—*Continued*

> * * * (A) uniform price is computed and it is this uniform price which the producer is actually paid by the proprietary * * * handlers. The uniform price is determined by a computation which in substance multiplies the amount of milk (classified according to its use) received by all handlers, less certain quantities of milk permitted to be deducted, by the minimum prices fixed * * * for the different classes of milk. From the result various payments and reserves are deducted and the remainder is divided by the total quantity of milk received. To equalize, handlers pay into the producer settlement fund. * * * When the handlers' purchased milk multiplied by the minimum price in less than when it is multiplied by the uniform price, the producer settlement fund pays them the difference for distribution to their producers. These provisions give uniform prices to all producers, * * *."

There will be noted in the foregoing quotation the phrase "handlers' purchased milk" as the multiplicand which, times the minimum price, results in a product constituting the handler's net pool obligation. The plaintiffs at bar seize upon this word "purchased" as the principal basis for their contention that their own-produced milk should not figure in the calculation of their respective net pool obligations. The Court, in *Rock Royal* was also called upon to construe the word "purchased" in determining whether a cooperative of producers was required to pay into the producer settlement fund. The Court determined that this cooperative, although marketing milk under an agency contract with its members, was a handler as defined in the Act and in the Order, and therefore, was obligated to pay into the fund. That the cooperative was of the agency type, acting for the producer members, did not, in the Court's opinion, eliminate its contributive obligation. At page 579 (of Rock Royal), the opinion points out:

> "It is obvious that the use of the world 'purchased' in the Act § 8c(5)(A) and (C), would not exclude the

Appendix E—*Continued*

'sale' type of cooperative. When § 8c(5)(F) was drawn, however, it was made to apply to both the 'sale' and 'agency' type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C). The section which authorizes all orders, § 8c(1), makes no distinction. The orders are to be applicable to 'processors, associations of producers, and others engaged in the handling' of commodities. The reports on the Bill show no effort to differentiate. Neither do the debates in Congress. * * * As here used, the word 'purchased' means 'acquired for marketing.' Subsection (A) *cannot be construed as freeing agents, cooperative or proprietary, from the requirement to account at the minimum prices for milk handled.*" (Emphasis supplied.)

Elm Spring Farm, Inc. v. United States, 1 Cir. 1942, 127 F.2d 920, was an action to enforce compliance with Order No. 4, covering the Greater Boston Marketing Area, upon a cooperative handling milk produced on farms operated under contract by "herdsmen". In this case, the reliance of the cooperative upon a narrow reading of §§ 8c(5)(A)/(E) of the Act was held unwarranted. At page 927 of that opinion, the Court said:

"These sections, which delimit the contents of orders to be issued under the Act, refer to milk 'purchased' from producers by handlers, and 'prices' to be paid by handlers for milk so purchased. The argument is as follows: 'Nothing in the language of the Act anywhere modifies the ordinary meaning of these words or authorizes an order to contain any monetary provisions applicable to a person, i.e., in this instance, a corporation, engaged in the distribution of milk given by its own cows. In such a case it is manifestly impossible for a 'purchase' to take place, with respect to milk which has been the property of such person, not merely from the instant of its being drawn into the pail, but even from the very earliest instant in its process of creation in which it could be recognized as having any existence

Appendix E—*Continued*

whatsoever.' This contention is foreclosed by *United States v. Rock Royal Co-Operative, Inc.*, 307 U.S. 533, 578-581, * * *."

A more recent decision construing the phrases "purchased by handlers" in the light of the other provisions of the Act, is to be found in *Shawangunk Cooperative Dairies, Inc. v. Jones*, 2 Cir. 1946, 153 F.2d 700. That case also dealt with Order No. 27 before its scope was extended to include the northern New Jersey area. At page 704 of that opinion, in disposing of the contention that only milk purchased by a handler need be considered in computing the handler's net pool obligation, the Court said:

> "Plaintiff points out that the statute, * * * in prescribing the terms of milk orders, * * * 'purchased from producers' and 'purchased by handlers.' 7 U.S.C.A. § 608c(5) (A, C, D, E). But since the Rock Royal case, * * * determined that the word 'purchased' was not to be literally construed, but was to read as the equivalent of the alternative statutory phrase 'acquired for the marketing,' and since the 'acquired' of the statute can mean no more than the 'received' of the regulation, plaintiff's contention is reduced to its claim that it did not acquire the milk *for marketing*. With this, however, we cannot agree, for, since no milk can enter the New York market without prior reception at an approved plant, plaintiff's acts here were indispensible to the total routing of the milk from the farms of the producers to its destination in New York City."

I accept the construction of the word "purchased" as applied in the *Rock Royal* case, *supra*, and those decisions which have followed it. I therefore conclude that the provisions of § 927.65 of Order No. 27 are fully in accord with the enabling statute, and that the refusal of the Secretary to exempt the plaintiffs from the obligation to include their own-produced milk in the calculation of their net pool obligations, was in all respects legal and within his statutorily delegated power.

Appendix E—*Continued*

Conclusions

In the proceedings for the enlargement of the territory of Order No. 27 to include northern New Jersey within the milk marketing area thereof, I find no unconstitutional lack of due process nor violation of the provisions of the applicable rules of the Secretary of Agriculture or of the provisions of the Administrative Procedure Act.

I find in the record before the Secretary substantial evidence justifying his promulgation of Order No. 27 in its present comprehensive form and his determination that northern New Jersey is appropriately includable with metropolitan New York and the other counties of that State named in § 927.3 of the Order, in a single milk marketing area.

I further conclude that the provisions of § 927.65 of the Order regulate own-produced milk of handlers within the area, and that the authority for such regulation is to be found in the Agricultural Marketing Agreement Act of 1937.

For these reasons defendant's motions for summary judgment are granted, and the cross-motions of the plaintiffs for summary judgment are denied.

An order may be presented in conformity with these conclusions.

REYNIER J. WORTENDYKE, JR.,
Judge, United States District Court.

APPENDIX F

Opinion of the United States Court of Appeals for the Third Circuit

(Filed February 27, 1961)

By FORMAN, *Circuit Judge.*

This appeal attacks the validity of § 927.65 of Federal Marketing Order No. 27 (Order 27),[1] issued by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, as amended (Act), 7 U.S.C.A. § 601 et seq. Order 27 regulates the handling of milk in the New York-New Jersey metropolitan area.

During 1956 and 1957 hearings were held by the Department of Agriculture upon various proposals to amend Order 27. As a result of these hearings § 927.65 was promulgated to be effective August 1, 1957. At that time it provided in pertinent part:

> "Sec. 927.65 *Net pool obligation of handlers.* The handler's net pool obligations shall be computed pursuant to paragraphs (a) through (g) of this section: *Provided,* That milk specified in pargraph (h) of this section shall be eliminated from this computation and such milk shall be deemed excluded by the phrase 'milk received from producers' as such phrases is used in this section . . ."
>
> • • • • •
>
> "(h) Milk specified in subparagraphs (1) through (3) of this paragraph shall be excluded from the computation of the handler's net pool obligation pursuant to this section.
>
> "(1) Milk received from farms in Nassau and Suffolk Counties in New York, which farms are not approved for sale of milk in New York City, and milk received from farms in New York City.
>
> "(2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at

[1] References to numbered sections of Order 27 are found in 7 C.F.R. as of August 1, 1957.

Appendix F—*Continued*

such plant from other dairy farmers, but is received from other plants.

"(3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant."

Appellant, Ideal Farms, Inc. (Ideal) leases and operates 19 farms in Northern New Jersey. All of the milk from these farms is collected and shipped to a plant operated by Ideal in North Haledon, New Jersey. Appellant, in addition, buys milk from other plants. At the North Haledon plant some of the milk is bottled and sold as such, either on routes owned by Ideal or on routes owned by independent retailers. The remainder of the milk is manufactured into various forms: cheese, butter, ice cream and flavored drinks.

Appellant, Franklin Lakes Dairy Producers, Inc., conducts an almost identical, though smaller, operation to that of Ideal except it supplements the milk it produces on its own farms with milk it buys from other dairy farmers.

Appellants contended that in purporting to regulate a handler's "own-produced" milk in § 927.65 of Order 27 the Secretary of Agriculture exceeded the authority conferred upon him by the Act. They filed their petition embodying this contention and others with the Secretary and a hearing was held before a Hearing Examiner. He issued a report containing proposed findings and conclusions recommending the dismissal of the petition. Exceptions were filed to the Examiner's report and subsequently a Judicial Officer of the Department of Agriculture acting for the Secretary pursuant to authority duly delegated to him heard arguments thereon and filed his opinion dismissing their petition. Jacob Tanis, 17 Agri. Dec. 1091 (1958).

The decision of the Judicial Officer constituted the final agency decision and the appellants then filed their complaint against the Secretary of Agriculture in the United States District Court for the District of New Jersey to review his action. See 7 U.S.C.A. § 608c(15)(B). The ap-

pellants and the Secretary filed respective motions for summary judgment, arguments upon which were heard by Judge Wortendyke, who filed an opinion in which he found in favor of the Secretary, 181 F. Supp. 62 (1960), and judgment was entered pursuant thereto.

It is from that judgment that this appeal is taken. Other issues were explored before the Agency and the District Court but only one question remains to be settled here, namely: Did the Secretary of Agriculture exceed the authority vested in him by the Act in promulgating § 927.65 of Order 27, which purports to make a handler accountable to the producer-settlement fund for milk which he produces on his own farms from his own herds?

In support of their contention appellants point to the word "purchased" as it appears in §§ 8c(5) (A) and (C) of the Act, 7 U.S.C.A. §§ 608c(5) (A) and (C).[2] They

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[2] Subsections (A), (B) and (C) of § 608c(5) are pertinent to the discussion here and read as follows:

"(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

"(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method of fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

"(B) Providing:

"(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provi-

argue that only milk "purchased" is subject to regulation and that the word "purchased" cannot be construed to cover milk which they obtain from their own farms."

Before discussing the legal question presented by this appeal, a brief reference to the operation of Order 27 may be useful. Milk is classified "in accordance with the form in which or the purpose for which it is used." Minimum prices are set for each use classification. However, such minimum prices are not directly paid to the producers since they are paid a uniform price irrespective of the uses made of such milk by the individual handler to whom it is

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sion is approved or favored by at least three-fourths of the producers who, during a representative period determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

"(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketing of milk during a representative period of time.

"(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section."

delivered. The seeming incongruity is resolved by the operation of the producer-settlement fund.

Each handler subject to the Order must report monthly to the Market Administrator as provided in § 927.50 of the Order. The report shows the total quantity of milk received by the handler from all producers, and the use to which the said milk was put by the handler. The handler then multiplies the amount of milk put to each class use by the class price and adds the resultant figures to arrive at a total figure, based upon amount and class price for each class, and known as the handler's net pool obligation. The handler does not owe this money to the producers from whom he received the milk, but rather owes it proportionately to all producers in the entire milk marketing area.

Upon receipts of all handlers' reports, the Market Administrator adds up the total weight of milk handled in the marketing area for the month in question. He then adds up the total use value of the milk as shown on each handler's report as the handler's net pool obligation. He then divides the weight of the milk into its total use value and arrives at a uniform price. See § 927.54 of the Order. The uniform price is commonly referred to as the "blend" price.

Under § 927.70 of Order 27 each handler must then pay his producers the uniform price as provided in the Act, 7 U.S.C.A. § 608c(5)(B)(ii).[3] Thus it can be seen that the handler owes to all producers as a class, the use value to which he puts milk received from producers, whereas the producer receives a uniform price for his milk regardless of the use to which it is put. This is known as the "market wide pool" since the uniform price is based on the utilization of milk throughout the entire marketing area.

Provision is made for the producer-settlement fund in

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[3] See note 2, *supra*, for complete text.

Appendix F—*Continued*

§ 927.75 of Order 27 wherein it is prescribed that, after the Market Administrator has determined the uniform price to be paid to all producers, he should calculate the amount of money that each handler owes to producers by multiplying the uniform price by the weight of the milk each handler has received. The resultant figure is compared with the handler's net pool obligation, to determine whether the handler pays into the producer-settlement fund or receives money from the producer-settlement fund. A handler whose net pool obligation is higher than the resultant figure pays the difference into the producer-settlement fund, whereas a handler whose net pool obligation is lower than the resultant figure receives the difference from the producer-settlement fund. This exchange of money among the handlers is to enable each handler to pay the uniform price to producers by making the handlers who put the bulk of their milk to a high use pay to the handlers who put the bulk of their milk to a low use.

Thus the appellants in essence seek to be exempt from making any payments into the producer-settlement fund on their "own produced" milk should their utilization thereof otherwise require such.

We now return to the legal issue presented. In its opinion the district court cited three cases as the basis for its conclusion that the regulation of "own-produced" milk by a handler is authorized by the Act. They are *United States v. Rock Royal Co-operative*, 307 U.S. 533 (1939);[4]

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[4] This (Rock Royal) is the leading case construing the section of the Act here involved. One of the four cooperatives concerned acted as a marketing agent for its members. It alleged that because it was merely the agent of its principals—the farmers—it could not be held to purchase the milk from them. In ruling on this contention the court said:

"... It is urged that cooperatives which merely act as agents for their members are not included in handlers purchasing from producers. This is said to be definitely shown by the

provisions of § 8c(5)(F) providing that nothing contained in the subsection shall be construed to prevent a Capper-Volstead cooperative from making distribution to its producers in accordance with the contract.' The Order defines a handler as including a cooperative association 'with respect to any milk received from producers at any plant operated by such association or with respect to any milk which it causes to be delivered' to other handlers. Under the provisions of the Order, Article VII, §§ 8 and 9, cooperative handlers as other handlers equalize their purchases by payment into the producer settlement fund, even though they are not required to pay the uniform price to their producers by reason of the exception of of Article VII, § 1 and the provisions of § 8c(5)(F), as explained at page 561.

"Cooperative contracts are of two general types, sale and agency. The Central New York Cooperative operates under the agency type.

"'It is obvious that the use of the word "purchased' in the Act, § 8c(5)(A) and (C), would not exclude the 'sale' type of cooperative. When § 8c(5)(F) was drawn however, it was made to apply to both the 'sale' and 'agency' type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C). The section which authorizes all orders, § 8c(1), makes no distinction. 'The orders are to be applicable to 'processors, associations of producers, and others engaged in the handling' of commodities. The reports on the bill show no effort to differentiate. Neither do the debates in Congress. The statutory provisions for equalization of the burdens of surplus would be rendered nugatory by the exception of 'agency' cooperatives. The administrative construction has been to include such organizations as handlers. With this we agree. As here used the word 'purchased' means 'acquired for marketing'. Subsection (A) cannot be considered as freeing agents, cooperative or proprietary, from the requirement to account at the minimum prices for milk handler.'" 307 U.S. at pp. 579-80.

The appellants in seeking to distinguish this case from *Rock Royal* argue that "the Court based its opinion that the Cooperative

1942)[5] and *Shawangunk Cooperative Dairies v. Jones*, 153 F.2d 700 (2 Cir. 1946).[6] In each of these cases the word

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must pay into the Producers Settlement Fund upon the fact that the Cooperative did not have its own farms."

The fact is that Order 27 as then in effect exempted "milk received from the handler's own farm." *U.S. v. Rock Royal Co-op., supra* at page 551, note 14. The Court did not say, as appellants intimate, that the Act would not permit such regulation.

[5] Here (Elm Springs) a cooperative organized by officers and stockholders of a pre-existing corporation, engaged in handling milk, took over the business of that corporation. It then took title to cattle from farmers giving in return mortgages and stock. The cattle did not change possession and there was little change in the farmers' status. The court held the cooperative not to be a producer and thus not exempt from the order then in effect. In discussing the construction of the word "purchased" it was said:

> "Appellant Cooperative relies upon a narrow reading of §§ 8c(5)(A)-(E) of the Act, 7 U.S.C.A. § 608c(5)(A-E). These sections, which delimit the contents of orders to be issued under the Act, refer to milk 'purchased' from producers by handlers, and 'prices' to be paid by handlers for milk so purchased. The argument is as follows: 'Nothing in the language of the Act anywhere modifies the ordinary meaning of these words or authorizes an order to contain any monetary provisions applicable to a person, i.e., in this instance, a corporation, engaged in the distribution of milk given by its own cows. In such a case it is manifestly impossible for a "purchase" to take place, with respect to milk which has been the property of such person, not merely from the instant of its being drawn into the pail, but even from the very earliest instant in its process of creation in which it could be recognized as having any existence whatsoever.' This contention is foreclosed by United States v. Rock Royal Co-operative, Inc., 307 U.S. 533, 578-581, 59 S.Ct. 993, 83 L.Ed. 1446 . . . ." 127 F.2d at p. 927.

[6] In that case (Shawangunk) Meadow Valley Farms, a corporate handler, ceased to operate its plant but in order that some fifty producers who had formerly delivered milk to it might maintain entrance to the marketing area, it arranged to have their

"purchased" was interpreted to mean "acquired for marketing".[7] Appellants argue that in none of these cases were the principals producers in the sense that they operated their own dairy farms and that in each case they acquired or received the milk subjected to assessment from another entity. They insist that in interpreting the word "pur-

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milk delivered to plaintiff's plant. Plaintiff sent the milk out for pasteurization and returned it to Meadow Valley Farms. When plaintiff was made accountable for the milk it brought suit. In reversing the district court which held Order 27 not applicable to a "mere gratuitous bailee" the court noted at page 704:

> "Nor do we think that the Order as thus construed goes beyond the terms of the governing statute. Plaintiff points out that the statute, unlike the regulation, in prescribing the terms of milk orders uses the words 'purchased from producers' and 'purchased by handlers.' 7 U.S.C.A. § 608c(5) (A,C,D,E). But since the Rock Royal case, supra, determined that the word 'purchased' was not to be literally construed, but was to read as the equivalent of the alternative statutory phrase 'acquired for marketing,' and since the 'acquired' of the statute can mean no more than the 'received' of the regulation, plaintiff's contention is reduced to its claim that it did not acquire the milk *for marketing*. With this, however, we cannot agree, for, since no milk can enter the New York market without prior reception at an approved plant, plaintiff's acts here were indispensable to the total routing of the milk from the farms of the producers to its destination in New York City.
>
> "In view of this interpretation of the Act, the objections made to the regulation and repeated here as pointing also to statutory requirements—the necessity of a legal title, of a proprietary interest as distinguished from that of a gratuitous bailee, and of a more personal relation between individual handler and producer—all fall as irrelevant. We think the Order was properly construed by the War Food Administrator and, as construed, is legal . . ."

[7] See *Grow v. Milk Control Commission*, 52 Pa. D.&C. 225 (1944) where the court held that a handler did "purchase" milk produced by his own herd.

chase" to mean "acquire" or "receive", title or possession must have passed from one to another and that "the very words indicate that at least two parties must be involved."

In effect appellants make the argument that although an agency cooperative was held to have "purchased" milk from its principals in *Rock Royal* and *Elm Spring*, two parties were involved whereas here there being only one party no "purchase" is possible as the word was construed in those cases. Such reasoning would mean that Congress intended to regulate a handler if he was the agent of a producer, but not a handler who is also a producer, although the effect in both instances is the same. Should the fact of agency make such a crucial difference? We do not think that such an illogical distinction was intended. Although not embodying the fact pattern of specific identity of producer and handler in the one entity present in appellants' situations the three cited cases make clear that the word "purchased" is to be liberally construed so as to achieve the purpose of the Act and strongly buttress the position of the Secretary that "own-produced" milk of a handler is subject to regulation. The purpose of the Act and Order was succinctly stated in *Elm Spring Farm v. United States*, *supra*, at page 927:

> ". . . The Act and Order seek to achieve a fair division of the more profitable fluid milk market among all producers, thereby eliminating the disorganizing effects which had theretofore been a consequence of cut-throat competition among producers striving for the fluid milk market. This is clearly set forth in the opinion in *United States v. Rock Royal Co-operative, Inc.*, 1939, 307 U.S. 533, 548, 550, 59 S. Ct. 993, 83 L.Ed. 1446."

Were we to accept appellants' construction of the word "purchased" they would avoid the intent of the Act to achieve a fair division of the more profitable fluid milk market among all producers and they would avoid the necessity of sharing the burden of surplus milk. See *United*

States v. Rock Royal Co-operative, Inc., supra, at pages 548, 580.

In the concededly broad construction here given to the word "purchased" we are guided by the pronouncement of the Supreme Court in *N.L.B.R. v. Lion Oil Co.,* 352 U.S. 282 (1956) that "in expounding a statute, we must not be guided by a single sentence or member of a sentence but look to the provisions of the whole law, and to its object and policy." To the same effect are *United States v. American Trucking Assns.,* 310 U.S. 534 (1940) and *Helvering v. Stockholm Enskilda Bank,* 293 U.S. 84 (1934).

Other provisions of this section of the Act explicitly recognize that a person or business entity may be engaged in the milk business in more than one capacity and that a producer is exempt from regulation only in his capacity as a producer. Section 8c(13)(B), 7U.S.C.A. § 608c(13)(B), provides:

> "No order issued under sections . . . 608c . . . of this title shall be applicable to any producer in his capacity as a producer."

In *Acme Breweries v. Brannan,* 109 F. Supp. 116 (N.D. Cal. 1952), the court had occasion to construe this provision. There the plaintiff was a manufacturer of beer and grew its own hops. The Secretary of Agriculture issued an order regulating the handling of hops. Plaintiff argued that it was not engaged in the "handling of hops" since it only used the hops it grew. The court held, however, that while *Acme* was exempt from regulation as a producer under § 8c(13)(B) of the Act it could be regulated as a handler since it did something to the hops other than grow them. It was a part of the distribution system that Congress intended to regulate.

Appellants attack any reliance on *Acme Breweries v. Brannan, supra,* claiming that sections of the Act controlling milk, 7 U.S.C.A. § 608(5)(A, C and E) and § 608c(18)

differ substantially from those regulating hops, § 608c(6)(G) (i, ii and iii). Appellants call attention to the former in which reference is made to "milk purchased" and to the latter where the words "purchase from or handle" or "purchased and handled" are used. They vigorously argue that there was clearly spelled out in the Act authority to limit the total quantity of hops to be handled among all producers and allotting the quantity of hops which any handler might handle. Such contentions are not denied but they are not persuasive that the different language used in the regulation of hops and other commodities compels the conclusion that it was not the intention of Congress to regulate a handler of milk who dealt also with his "own-produced" milk. In *Acme Breweries* the plaintiff indeed argued that the word "handle" had a well defined meaning, i.e., "to buy and sell; to deal or trade in" and that since it was a consumer of its own hops it could not be held to handle them. The court rejected this argument and looking to the purpose of the Act and the specific exemptions in § 8c(13)(A) and (B) held plaintiff to be a handler and subject to regulation. The court reasoned as noted above that while a producer may not be regulated per se Congress did intend to regulate him should he engage in the capacity of a handler. The analogy to this case is cogent. Moreover the thrust of appellants' argument goes directly counter to the liberal construction given to the word "purchased" in *United States v. Rock Royal Co-operative, Inc., supra,* and *Shawangunk Cooperative Dairies v. Jones, supra,* where it was held to apply to an agency cooperative and a gratuitous bailee respectively.

Section 8c(5)(C) which is the statutory basis for the producer-settlement fund indicates that producers who are handlers are subject to regulation. That section provides:

> "In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing

Appendix F—*Continued*

> a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this section." (Note 2, *supra*)

It could be argued that the parenthetical phrase was included merely to make it clear that producer handlers could be made to equalize on milk purchased from other producers. If this were all that was intended it seems hardly necessary to have included the parenthesis since a handler who purchased milk from other producers would clearly be covered as a handler with respect to such milk whether or not he might be a producer-handler with respect to milk of his own production. The more reasonable construction is that the parenthetical phrase was meant to reach a producer-handler who handles or distributes milk which he himself produces.

Regulation of producer-handlers in their capacities as handlers is not of recent origin. Article VI, § 1(3) of the original Order 27 regulated such handlers in that it only permitted them to "[s]ubtract pro rata out of each class the quantity of milk received from the handler's own farm," in the computation of their "Net Pool Obligation". See *Rock Royal Co-operative, Inc., supra*, at page 551, note 14. In 1941 Order 45 (7 C.F.R. 945.1 et seq., effective August 29, 1941), affecting the Washington, D. C. area, charged each handler a certain amount per hundredweight with respect to all milk received from producers including his "own-produced milk" to defray the expense of administration. In 1946, Order 4, affecting the Greater Boston Area (7 C.F.R. 904.1 et seq., effective June 1, 1946) imposed a similar charge. Since August 1, 1953, Order No. 3 (7 C.F.R. 903.1 et seq.) affecting the St. Louis Marketing Area has required handlers to pay into their producer-settlement fund on milk received from their own farms. See *In re Benbush Dairy*, 17 Agri. Dec. 1185 (1958). Simi-

Appendix F—*Continued*

larly Order No. 19 (7 C.F.R. 919.1 et seq.) involving the Southwest Kansas Marketing Area has required such payments since July 1, 1954. See *In re Sunflower Dairy*, 15 Agri. Dec. 1 (1956).

While it is true that only since 1953 have handlers been required to make payments into the producer-settlement fund it is also true that from the very beginning the Department of Agriculture has construed the Act so as to permit regulation of producer-handlers in their capacities as handlers. This contemporaneous and long standing construction of the Act by the agency charged with administering it is entitled to substantial weight. *United States v. Leslie Salt Co.*, 350 U.S. 383, 396 (1956); *Mazer v. Stein*, 357 U.S. 201, 213 (1954), 1 Davis Administrative Law § 5.06 (1958).

The present provisions of the Act were first enacted as amendments to the Agricultural Adjustment Act of 1933, 48 Stat. 31, by the Act of August 24, 1935, 49 Stat. 750.[8] In 1936 the Supreme Court held invalid certain sections of the Agricultural Adjustment Act of 1933 with respect to processing taxes. *United States v. Butler*, 297 U.S. 1 (1936). Thereafter Congress reenacted the section under discussion here in the Marketing Agreement Act of 1937, 50 Stat. 246.

While the 1935 amendments were before the Senate a discussion took place which indicates that Congress intended that producer-handlers be regulated in their latter capacity. This discussion in which Senators Copeland, Byrd and Murphy took part is set out in the margin.[9] The appellant

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[8] These amendments originated in H.R. 8492 which was before the Senate. See 79 Cong. Rec. 11, 130 (1935) and 79 Cong. Rec. 9568, 9569, 9570 (1935).

[9] At first the matter was commented upon by Senators Copeland and Murphy:

"MR. COPELAND. In Upstate New York a great many of the milk handlers are producers and distributors. According to

deprecates the use of this legislative history contending that "a study of the record of this discussion discloses that

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the amendments as they are set up, if I am correctly advised, every one of those who may directly burden, obstruct, or affect interstate commerce would be subject to all the orders promulgated by the Secretary of Agriculture. These producers and distributors would be required to make adjustments in payments by being compelled to contribute to the maintenance of an adjustment or equalization fund and to pay their pro rata share of the expenses to the authority or agency which administers the order. Therefore the distributors who have an additional investment in not only producing their own milk but also in pasteurizing the milk, which is absolutely necessary under the law, would have to share their position in the market with other producers. Is that correct?

"MR. MURPHY. Yes; that is correct." 79 Cong. Rec. 11,138 (1935).

A short time later the following discussion took place between Senators Byrd and Murphy:

"MR. BYRD. Mr. President, a little while ago the Senator stated that the producer could exercise his own choice as to going into these marketing agreements or staying out of them. I doubt whether that statement is quite correct, because if a producer handles his own milk he becomes a handler and therefore is subject to all the rules and regulations affecting handlers.

"MR. MURPHY. The point that the producer and the handler cannot be regulated at the same time is well taken. But the producer who is also a handler is not denied a voice. He can vote as a producer.

"MR. BYRD. He can vote, but once the marketing agreements are established he is subject to the marketing agreement as a seller of milk.

"MR. MURPHY. Precisely.

"MR. BYRD. Therefore, as a producer, he is being regulated possibly without his consent.

"MR. MURPHY. Well, he has voted on the question. We provide for two-thirds majority rule. How much more majority do Senators want? Suppose 66⅔ percent of the producers are in favor of this plan, and one-third are not in favor of it; who should be our guide?" 79 Cong. Rec. 11,140 (1935).

no conclusions were reached." We do not agree. The record clearly discloses that the Senate was discussing H.R. 8492 in which the 1935 amendments were embodied and that these amendments were finally accepted and passed. The Senators were discussing the provisions of the Act which we are here construing. Appellants also cite the concurring opinion in *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 395 (1951)[10] to support their opposition to the use of legislative history here.

We first note that the explanation of the milk provisions of the Act made by Senator Murphy were not mere "casual statements from floor debate" but were comments of a senator who clearly appears to have been in charge of those provisions on the Senate floor. Resort may be had to the statements of such an authoritative person. *Wright v. Vinton Branch*, 300 U.S. 440, 464, note 8 (1937); *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 475 (1920); *Richbourg Motor Co. v. United States*, 281 U.S. 528, 536 (1929); Sutherland, Statutory Construction §§ 5011, 5012 (3rd ed. Horack 1943); Note, A Decade of Legislative History in the Supreme Court, 46 Va. L. Rev. 1408 (1960). For the use of such statements of explanation in recent cases see e.g., *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959); *Steiner v. Mitchell*, 350 U.S. 247, 254 (1956).

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[10] That opinion by Justice Jackson, in which Justice Minton joined, reads in part, as follows:

* * * * * * *

"Resort to legislative history is only justified where the face of the Act is inescapably ambiguous, and then I think we should not go beyond Committee reports, which presumably are well considered and carefully prepared. I cannot deny that I have sometimes offended against that rule. But to select casual statements from floor debates, not always distinguished for candor or accuracy, as a basis for making up our minds what law Congress intended to enact is to substitute ourselves for the Congress is one of its important functions . . ."

Appendix F—*Continued*

Appellants also object to the use of legislative history where the statutory language is ambiguous. That the language is not unambiguous would seem to flow from the holdings in *Rock Royal* and *Shawangunk* cases, *supra*. In any event, the words of Justice Frankfurter in *Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp.*, 348 U.S. 437, 444 (1954) now appear pertinent:

> "This examination would conclude the construction of the section by English courts, that is, by any court reading legislation as it is written without drawing on parliamentary debates. And considering that the construction we have found seem plain, the so-called 'plain meaning rule,' on which construction is from time to time rested also in this Court, likewise makes further inquiry needless and indeed improper. But that rule has not dominated our decisions. The contrary doctrine has prevailed. See *Boston Sand & Gravel Co. v. United States*, 278 U.S. 41, 48; *United States v. Dickerson*, 310 U.S. 554, 561. And so we proceed to an examination of the legislative history to see whether that raises such doubts that the search for meaning should not be limited to the statute itself."

Appellants argue that prior to August 1, 1957 "own-produced" milk was not subject to regulation and that because present conditions may require such regulation the breadth of the legislation may not be extended to cope with present exigencies. As to prior regulation we have established that the original Order 27 did so provide. But even were this not so, it has been established that the regulation of "own-produced" milk goes back in other areas to 1941. That such regulation may not have been included in Order 27 does not detract from the fact that the Department of Agriculture has for so long a time considered "own-produced" milk to be subject to regulation. We agree that the Department may not extend the breadth of the Act in order to meet present exigencies. But we do not agree that is what has been done.

Appendix F—*Continued*

In their brief and at the oral argument appellants urged that

> ". . . of the ten billion pounds of milk accounted for in the New York and Northern New Jersey Milk Marketing Area, the quantity reported by handlers' '*own production*' *is infinitesimal.* It has been determined that requiring all handlers who produce their own milk to account for it in the 'pool' results in an increase of payment to other producers in the area of 5 mills per cwt. of milk. . . ."

Appellants estimate that this would amount to $9.00 per year per producer whereas their costs would rise $36,000 per year. They concede that this argument is advanced for the purpose only of supporting their position that the Act does not authorize the contested regulation. In effect, they argue that the amount of handlers' "own-produced" milk is allegedly so small (and the burden of the regulation so onerous upon the producer-handler) that it is unreasonable to assume that Congress intended to authorize such regulation. From what we have said before concerning the over-all purpose of the Act it is obvious that we cannot agree. Moreover, the finding of facts and reasoning by the Secretary leading to the determination that § 927.65 of the Order is designed to protect the regulatory scheme of the Act and is authorized by it,[11] when viewed in the light of his expertise, overcomes the appellants' argument.

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[11] "3. Pursuant, in part, to a notice issued February 26, 1957 (22 F.R. 1219), a public hearing was held on a proposal, among others for amendment of the milk marketing order regulating milk handling in the New York metropolitan area. Some of the evidence bearing on the contested provision adduced at such hearing appears in the paragraph below.

"Producer-dealers in general have largely a Class I or fluid utilization of milk. In Northern New Jersey, there are 62 producer-distributors (receiving no milk from others) and 22 dealers with producing farms. They are an important segment of the in-

Appendix F—*Continued*

Appellants place great reliance on two cases. They are *Dairymen's League Cooperative Association v. Brannan*, 173 F.2d 57 (2 Cir. 1947) and *Vance v. Benson*, (S.D. Miss.) unreported, and now on appeal.

In *Dairymen's League*, the plaintiff was a cooperative which had acquired milk from its producers at so called country plants in New York where it was made into cream and sent to its plant in Newark, New Jersey, from where it was sold to other handlers. *Dairymen's League* alleged

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dustry, producing seven percent, or 59,000,000 pounds, of the annual production of milk in the area, with five percent of Class I sales in such area. In view of the number of producer-dealers and their importance, their milk should be pooled with no exemption except for certified milk. Complete exemption would result in a competitive advantage to producer-dealers equal to the difference between the blend price and the Class I price on their Class I sales. A handler with a high fluid utilization would have to make such payments to the pool. Exemption of producer-dealers would open the way to economically unjustified expansion by such handlers due to the competitive advantage resulting from nonregulation. The family-farm type of producer-dealer operation should be exempt from pooling. It should be considered in relation to producers of the same production and not to other handlers. A fixed quantity exemption of a daily average of 1,000 pounds of milk should cover the family-farm type of operation with 50 to 60 cows and such businesses are not sufficiently significant to constitute a serious competitive factor in the marketing area. Handling of more than this amount or buying from or selling to other producers or handlers should result in pooling of a producer-dealer's entire production. There are 200 or 300 producer-dealers in Northern New Jersey and Upstate New York and pooling their milk with the milk of all other producers would increase the blend price although such price would not be greatly increased thereby. The question of equity between producer-dealers and other producers and handlers is an important consideration. A producer who bottles and sells all his milk but one can and sends that can to a country plant of another handler pools his surplus but does not pool his fluid utilization. Other producers must share in the total market utilization." Jacob Tanis et al., 17 Agri. Dec. 1091, 1093-1094.

that the shipment from one of its plants to another constituted a purchase which would have afforded it a lower value on the cream. It first should be noted that the court in that case was not called upon to construe the word "purchased" found in §8c(5)(A) and (C) of the Act, 7 U.S.C.A. §608c(5)(A) and (C), but was construing the word "purchased" used in defining Class III-D milk in §927.4(b)(7) of Order 27 as it then existed.[12] Second, the cream there moved from one handler operation to another handler operation within the same business entity and did not, as here, move from a producer operation to a handler operation. The court rejected the contention of *Dairymen's League* that shipments from its country plants to its Newark plant constituted the latter a "purchaser" as that term was used in §927.4(b)(7). Since the context in which the word "purchaser" was used in *Dairymen's League* and the purpose involved there are clearly distinguishable from the situation here the appellants fail to derive the claimed aid from it.

In *Vance v. Benson, supra*, the court, on facts similar to those at bar, held that a handler could not be regulated with respect to his "own-produced" milk. With due deference to that court, we cannot agree.

In view of the foregoing we hold that Judge Wortendyke correctly concluded:

> ". . . that the provisions of §927.65 of Order No. 27 are fully in accord with the enabling statute and that

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[12] It was there provided:

> "Class III-D milk shall be all milk the butterfat from which is delivered as cream to a *purchaser, not a handler*, outside the State of New York and outside any county in other States in which there is a plant which is approved by any health authority for the receiving of milk to be sold in the marketing area, also milk the butterfat from which leaves or is on hand at a plant in the form of cream cheese." (Italics supplied.) 7 C.F.R., 1938 Supplement.

the refusal of the Secretary to exempt the plaintiffs (appellants) from the obligation to include their own-produced milk in the calculation of their net pool obligations, was in all respects legal and within his statutory delegated power."

The judgment of the district court will be affirmed.

APPENDIX G

HASTIE, *Circuit Judge*, dissenting.

The marketing order in controversy was issued under the authority conferred upon the Secretary of Agriculture by Section 8c(5) of the Agricultural Marketing Agreement Act of 1937, as amended. 7 U.S.C. § 608c(5). If authority for its provisions cannot be found there, then it is conceded that the order is illegal.[1] That subsection begins by specifying that an order issued under its sanction shall contain only those "terms and conditions" which are specified in the detail of its text. The provision thought to be relevant here appears in subsection 8c(5)(A) and authorizes the fixing of certain minimum prices "which all handlers shall pay . . . for milk purchased from producers. . . ." An additional reference to the same subject matter in subsection 8c(5)(C) does not require any separate or additional comment.

The complaint here is that a marketing order under Section 8c(5)(A) and (C) has made the plaintiffs, as handlers of milk, accountable to the general producer-settlement fund for milk produced by their own cows on their own farms. The question of statutory construction is, in what meaningful sense can it be said that there has been a "purchase" of milk by a "handler" from a "producer" where an individual both produces and handles his own milk?

I would agree with the result the court reaches if I could find a satisfactory affirmative answer to this question, but I can find none. The opinion of the court quotes the old and properly repeated admonition of the Supreme Court

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[1] Here, different from *United States v. Lehigh Valley Cooperative Farmers, Inc.*, No. 13,290, decided by this court February 20, 1961, neither the Secretary of Agriculture nor the court has undertaken to justify the order under the "incidental" and "necessary" powers conferred upon the Secretary by subsection 8c(5)(F). Nor do I see how regulation of milk not purchased could fairly be described as incidental and necessary to the regulation of milk that is purchased.

that "in expounding a statute, we must not be guided by a single sentence or a member of a sentence, but look to the provisions of the whole law, and to its object and policy." See *N.L.R.B. v. Lion Oil Co.*, 1957, 352 U.S. 282, 288, quoting from *United States v. Boisdoré's Heirs*, 1850, 8 How. 113, 122. In relating this language to the present situation the court demonstrates most persuasively that it is equitable and advances the overall scheme and purpose of the Act to regulate producer-handlers as has been done in Marketing Order No. 27. But if Congress has used restrictive language in the relevant operative provision of a statute, resort to the overall purpose of the legislation does not in my view justify relaxing a stated restriction in a way inconsistent with any reasonable construction of the restrictive language itself.

Here the operative language of the statute authorizes certain impositions upon handlers of milk who purchase from producers, and nothing more than that. It seems to me that no reasonable construction can make the "purchase" concept cover the conduct of persons who as handlers simply process and distribute milk they have produced on their own farms.

I am not unmindful that in *United States v. Rock Royal Co-Operative, Inc.*, 1939, 307 U.S. 533, the Supreme Court held that a cooperative handling milk acquired from individual producers who are members of the cooperative is a "purchaser" from these members, whether the cooperative is of a "sale" type or an "agency" type. But the Court caused this decision to turn upon the fact that Congress had made subsection 8c(5)(F) expressly applicable to both types of cooperatives, thereby indicating that no distinction should be made between types of cooperatives in the companion subsections 8c(5)(A) and (C). But the special treatment of cooperatives in section 8c(5) does not in my view afford any basis for the present interpretation of "purchase" in a case involving merely one individual who produces and

handles his own milk as distinguished from a cooperative which handles milk for its several members.

Perhaps Congress overlooked the fact that the language it used excludes the individual who handles his own milk. Perhaps, advised of this restriction, Congress would wish to broaden the statute. Certainly, the argument of the government to us and the opinion of this court make a strong case for doing so. But I am unable to avoid the conclusion that by judicial decision we are now giving the Secretary of Agriculture authority which the statute as enacted by Congress withheld. I cannot reconcile such action with my understanding of the restricted role our polity assigns to courts in construing and applying statutes. Therefore, I regretfully dissent from a decision which may well be very helpful to the orderly and effective regulation of a vital industry.

APPENDIX H

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,263

IDEAL FARMS, INC., and FRANKLING LAKES DAIRY PRODUCERS, INC.,

Appellants,

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: McLAUGHLIN, HASTIE AND FORMAN,

Circuit Judges.

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel,

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

Attest:

IDA O. CRESKOFF
Clerk

February 27, 1961

APPENDIX I

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13263

IDEAL FARMS, INC., and FRANKLIN LAKES DAIRY PRODUCERS, INC.,
Appellants,

vs.

EZRA TAFT BENSON, Secretary of Agriculture of the United States of America

Pursuant to Rule 36 (2) of this Court, it is ORDERED that issuance of the mandate in the above cause be, and it is hereby stayed until April 27, 1961.

PHILLIP FORMAN
Circuit Judge

Dated:
March 29, 1961

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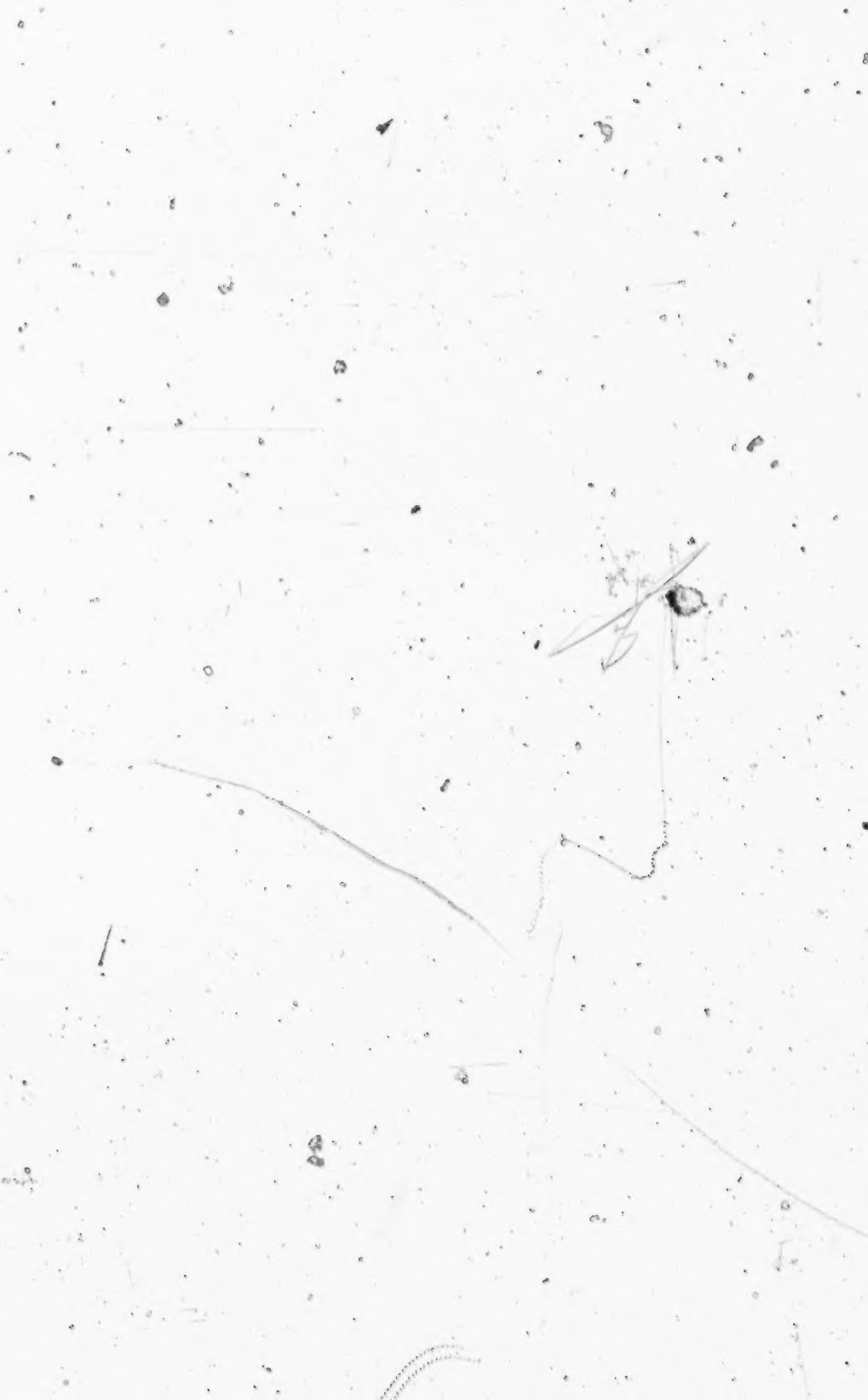

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 154

IDEAL FARMS, INC. AND FRANKLIN LAKES DAIRY PRODUCERS, INC., *Petitioners*

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey (Pet. App. 44-63) is reported at 181 F. Supp. 62. The opinion of the United States Court of Appeals for the Third Circuit (Pet. App. 64-87) is reported at 288 F. 2d 608.

JURISDICTION

The judgment of the Court of Appeals was entered on February 27, 1961 (Pet. App. 88). A timely petition for rehearing was denied on March 23, 1961. The petition for a writ of certiorari was filed on June 16, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture exceeded his authority under the Agricultural Marketing Agreement Act of 1937, as amended, by promulgating Milk Marketing Order No. 27, insofar as certain provisions of that order make handlers of milk accountable to the Producer Settlement Fund with respect to milk which the handlers themselves produce, in their capacity as producers, and market in their capacity as handlers.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, and Milk Marketing Order No. 27 are set forth in the Appendix, *infra*, pp. 16-20.

STATEMENT

A. The Regulatory Background

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, establishes a system for regulating the marketing of certain agricultural commodities, including milk, insofar as they are in the current of, or affect, interstate or foreign commerce. Its express purpose is to promote and maintain such orderly marketing conditions "as will establish, as the prices to farmers, parity prices * * *" and as will avoid unreasonable fluctuations in supplies

and prices. 7 U.S.C. 602. But whenever the parity prices are unreasonable with respect to milk in a particular marketing area, in view of the relevant economic factors in that area, the Act directs the fixing of such prices for the marketing area as will reflect the economic factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. 7 U.S.C. 608c(18).

To achieve these purposes, the Act authorizes the Secretary of Agriculture to issue marketing orders, effective within regional production or marketing areas, which are applicable to persons engaged in the distribution of milk and milk products. See 7 U.S.C. 608c. These persons are called "handlers", a term defined in 7 U.S.C. 608c(1) to mean "processors, associations of producers, and others engaged in the handling of * * *" milk.

The Act also outlines the provisions which a milk order may contain. An order may provide for "[c]lassifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay * * * for milk purchased from producers or associations of producers." 7 U.S.C. 608c(5)(A) (App., *infra*, p. 16). It may also provide "for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered * * *." 7 U.S.C. 608c(5)(B)(ii) (App., *infra*, p. 17). To achieve these purposes, a milk order may provide "a method for making adjustments in payments, as among handlers (including producers who are also handlers),

to the end that the total sums paid by each handler shall equal the value of the milk purchased by him" as determined by the class prices fixed. 7 U.S.C. 608c(5)(C); (App., *infra*, p. 17). The Act further provides that no order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c (13) (B) (App., *infra*, pp. 17-18).

Milk Marketing Order No. 27 was promulgated by the Secretary of Agriculture in 1938 to regulate the handling of milk in the New York metropolitan marketing area.[1] 3 F.R. 1945, 1957, 2100, 2102. In 1957 the order was amended to extend the marketing area to Northern New Jersey and certain additional areas in New York. 22 F.R. 4643. The plan set out by the order is generally characterized as a market-wide pool and requires the classification, pooling, and pricing of all milk delivered by producers or associations of producers to "pool plants".[2]

In recognition of the fact that the value of milk is dependent upon the use made of it, the milk is classified according to its utilization (*i.e.*, as fluid milk or a derivative product), and minimum prices are set for each

[1] This Court has, in the past, noted the unique problems of the milk industry, arising from the intrinsic nature of its product. *Nebbia* v. *New York*, 291 U.S. 502, 516-518; *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, 549-550. In the *Rock Royal Co-op.* case, in which the Court upheld the constitutionality of the Agricultural Marketing Agreement Act of 1937, it also considered and sustained certain provisions of Order No. 27.

[2] The order provides for the designation as pool plants of such establishments for the receiving, handling, or processing of milk or milk products as meet the requirements specified. 7 C.F.R. 927.25-927.29. The pool plants are, in the main, those establishments which handle milk primarily for the marketing area defined in the order.

use classification. 7 C.F.R. 927.30-927.46. Pursuant to the Milk Marketing Order, each pool plant handler is required to file a monthly report with the Market Administrator, indicating the total quantity of milk received by him from all sources, including milk of his own production, and the use which was made of the milk. 7 C.F.R. 927.50. The handler's pool obligation is determined by multiplying the amount of milk in each class by the class price and adding the resulting figures. 7 C.F.R. 927.65.

On the basis of the data for all handlers, the Market Administrator calculates a "uniform" or "blend" price[3] which is the minimum price per unit which each pool plant handler must then pay to all his producers, regardless of the uses to which the individual handler puts the milk. 7 C.F.R. 927.70.

Although the producers receive a uniform minimum price for their milk, the minimum prices actually paid by each handler are geared to the uses to which he puts his milk. The handlers' minimum prices are "equalized" through the medium of the "Producer Settle-

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[3] The formula underlying the blend price has been described as follows (*Grant* v. *Benson*, 229 F. 2d 765, 767, (C.A.D.C.), certiorari denied, 350 U.S. 1015):

> The Market Administrator computes the value of milk used by each pool handler by multiplying the quantity of milk he uses in each class by the class price and adding the results. The values for all handlers are then combined into one total. The amount is decreased or increased by several subtractions or additions * * *. The result is divided by the total quantity of milk that is priced under the regulatory program. The figure thus obtained is the basic or uniform price which must be paid to producers for their milk. * * *

ment Fund", maintained by the Market Administrator. 7 C.F.R. 937.75. The Administrator multiples the quantity of milk received by each handler from producers by the blend price. He then compares the resulting figure with the handler's pool obligation. A handler whose pool obligation is higher than the resulting figure pays the difference into Producer Settlement Fund, whereas a handler whose pool obligation is lower than the resulting figure receives the difference from the Fund. 7 C.F.R. 927.79.

By virtue of Section 927.65 of the Order, effective August 1, 1957, 22 F.R. 4652-4653 (App., *infra*, pp. 18-19), a handler must, with certain exceptions,[4] include, in the computation of his pool obligation, milk which he has produced on his own farm or farms and disposed of as a handler. Accordingly, handlers are made accountable to the Producer Settlement Fund with respect to their utilization of milk which they themselves produce, as well as with respect to their utilization of milk obtained from other producers.

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[4] The section, as promulgated in 1957, permitted the exclusion from the computation of the handler's net pool obligation of (1) milk from certain New York sources; "(2) [m]ilk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants"; and "(3) [a]ll milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant." 7 C.F.R. 927.65(h), 22 F.R. 4652-4653 (App., *infra*, p. 19). In 1958, this exclusion provision was further amended, but not in any respect material to the issue present here. See 7 C.F.R. 927.65(h), as amended, 23 F.R. 6737, 6739-6740 (App., *infra*, p. 20).

B. The Proceedings Below

Petitioner Ideal Farms, Inc., operates a milk processing plant in North Haledon, New Jersey, and is a handler regulated under Order No. 27. It obtains milk from several farms which it leases and operates, and also buys milk from other milk plants (Pet. App. 65). Petitioner Franklin Lakes Dairy Producers, Inc., similarly is a New Jersey milk handler under Order No. 27. It obtains milk produced on its own farms, and, in addition, buys milk from other dairy farmers (Pet. App. 65).

On August 1, 1957, petitioners filed petitions with the Secretary of Agriculture, pursuant to Section 8c (15)(A) of the Agricultural Marketing Agreement Act of 1937, 7 U.S.C. 608c(15)(A), alleging, *inter alia*, that Section 927.65 of Order No. 27, insofar as it included the milk produced on petitioners' own farms in the calculation of their obligations to the Producer Settlement Fund, was not authorized by the Act (Pet. App. 27. Petitioners reasoned that, since Section 8c(5), 7 U.S.C. 608c(5) (App., *infra*, pp. 16-17) authorizes the formulation of a regulatory scheme only with respect to milk "purchased" from producers, it follows that milk obtained by a handler from his own farms—which has not been "purchased" in the commercial sense—is not subject to regulation.

In his recommended decision, the Hearing Examiner concluded that the petitions should be dismissed (Pet. App. 15-25). Subsequently, the Judicial Officer, acting on behalf of the Secretary, considered petitioners' contentions and entered an order dismissing the petitions (Pet. App. 26-43). Pursuant to Section 8c (15)(B) of the Act, 7 U.S.C. 608c(15)(B), petitioners then filed in the district court a suit for

review of the Secretary's ruling. The district court held that the Secretary of Agriculture did not exceed his authority under the Act by promulgating Section 927.65 of the Order, which makes a handler accountable to the Producer Settlement Fund for milk produced on his own farms. Accordingly, the court entered summary judgment in favor of the Secretary (Pet. App. 44-63).

On appeal, the Court of Appeals for the Third Circuit affirmed (Pet. App. 64-84). Judge Hastie noted his "regretful * * * dissent" from the court's opinion (Pet. App. 85-87). Although he conceded that the result reached by the court was "equitable and advance[d] the overall scheme and purpose of the Act" (Pet. App. 86), he concluded, in support of petitioners' position, that the word "purchased" must be construed in a limited sense.

ARGUMENT

Petitioners seek review in this Court of the holding below that the Secretary of Agriculture did not exceed his authority under the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. 601, *et seq.*, by promulgating Milk Marketing Order No. 27 insofar as Section 927.65 of the Order (App., *infra*, pp. 18-19) regulates handlers of milk with respect to their own farm production. That holding, in our view, is correct. Moreover, it does not conflict with decisions of this Court or other courts of appeals. The petition should therefore be denied.

1. Petitioners base their contention almost entirely on the fact that Section 8c(5)(A) and (C) of the Act, 7 U.S.C. 608c(5)(A), (C), (App., *infra*, pp. 16, 17), authorizes the formulation of an Order only in terms

of milk "purchased" by handlers. Petitioners reason that milk which a handler has himself produced is not milk "purchased" within the meaning of the Act because the handler has not entered into "a contract of purchase, *i.e.*, a commercial transaction between two or more separate entities or persons" (Pet. 7).

But this Court has already construed the term "milk purchased", for purposes of Section 8c(5) of the Act, to mean simply milk "acquired"; therefore, it necessarily follows that the section does permit handlers to be regulated with respect to all milk received by them, whether coming from their own farms or from other sources. In *United States* v. *Rock Royal Co-op.*, 307 U.S. 533, suit had been brought against four dairy cooperatives to compel them to comply with the requirements of Order No. 27. One of the cooperatives claimed that it was exempt from regulation since it acted merely as a marketing agent for its members and therefore could not be deemed to "purchase" milk as contemplated by Section 8c(5)(A) and (C). This Court pointed out that such a narrow interpretation of the Act, requiring a distinction between the "agency" and "sale" types of cooperatives, was unjustified and would render the regulatory scheme nugatory. The Court held that, as used in the Act, "the word 'purchased' means 'acquired for marketing.'" 307 U.S. at 580.[5] Similarly in *Shawangunk Coopera-*

[5] Judge Hastie's dissenting opinion below reasoned that this definition of "purchased" must be restricted to the situation involved in the *Rock Royal Co-op.* case because "the Court caused [that] decision to turn upon the fact that Congress had made subsection 8c(5)(F) expressly applicable to both types of cooperatives, thereby indicating that no distinction should be made between types of cooperatives in the companion subsections 8c(5)(A) and (C)"

tive Dairies, Inc. v. *Jones, et al.*, 153 F. 2d 700 (C.A. 2), the court rejected a handler's contention that he was not accountable for certain milk under Order No. 27 because he had not "purchased" the milk within the meaning of the Act, but was merely in the position of a gratuitous bailee. The court of appeals pointed out that in the *Rock Royal Co-op.* case this Court had already settled the question by interpreting the statutory word "purchased" as being equivalent to "acquired for marketing". The Second Circuit added that "acquired" meant simply "received" (153 F. 2d at 704). The rule of the *Rock Royal Co-op.* case was also applied by the First Circuit in *Elm Spring Farm* v. *United States*, 127 F. 2d 920, 927.

Petitioners sought to distinguish these cases on the ground that although the term "purchased" could be construed to mean "acquired" or "received" in a situation in which milk had been transferred between two or more parties, the term should not be so construed in the present case where only one party exists (as both producer and handler) and therefore does not "transfer" milk. The court below correctly pointed out the fallacy in this distinction (Pet. App. 73):

> Such reasoning would mean that Congress intended to regulate a handler if he was the agent of a producer, but not a handler who is also a producer, although the effect in both instances is the same. Should the fact of agency make such a crucial difference? We do not think that such an illogical distinction was intended.

(Pet. App. 86). But since "purchased" was construed to mean "acquired for marketing" to achieve the purposes of the Act with regard to cooperatives, there is no reason why it should not similarly be construed to effectuate the policies of the Act in the present case.

2. When the Agricultural Marketing Agreement Act is read as a whole, it is clear that the use of the word "purchase" was not meant to preclude the regulation of handlers who produce their own milk. Section 8c(5)(C) (App., *infra*, p. 17) in authorizing the adjustment of payments among handlers specifically provides that such regulation is applicable to "producers who are also handlers." The obvious intent of this clause was to subject handlers to regulation with respect to milk which they themselves produced. Petitioners have suggested that this clause was included merely to make it clear that producer-handlers could be made accountable to the pool on milk purchased from other producers. But such a construction would reduce the clause to surplusage because a handler is undoubtedly subject to regulation with respect to milk purchased from others, whether or not he also produces milk himself.

Moreover, the Act provides that no marketing order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c(13)(B) (App., *infra*, pp. 17-18). The necessary implication of this provision is that a handler is exempt from regulation *only* in his capacity as a producer, but is not exempt under any circumstances in his capacity as a handler. See *Acme Breweries* v. *Brannan*, 109 F. Supp. 116 (N.D. Cal.). Furthermore, as the court below pointed out (Pet. App. 77-79), there is authoritative legislative history which shows that Congress intended to regulate producer-handlers in their capacity as handlers. 79 Cong. Rec. 11138, 11140.

3. The lower court's construction of the Act and the Order is also in accord with the purposes of the Act. On the basis of the evidence adduced at public hearings

on Order No. 27, the Secretary of Agriculture found, that, with regard to the relevant marketing area, "exemption of producer-distributors from regulation would open the way to unwarranted expansion by such distributors and * * * unfair advantage could be taken of the market-wide pool at the expense of other producers and handlers" (Pet. App. 41; *Jacob Tanis, et al.*, 17 Agri. Dec. 1091, 1103; see 22 F.R. 4194, 4218-4219). In general, producer-distributors produce and market high return or fluid utilization milk (Pet. App. 29, 41). If they were not required to make payments into the Producer Settlement Fund with respect to their milk utilization, they could effectively circumvent the purpose of the Act to make *all* handlers share in the burden of surplus or low return milk. See *United States* v. *Rock Royal Co-op., supra*, 307 U.S. at 580. They would thereby also gain competitive advantage over other handlers who are accountable to the Fund for their high return sales. In addition, if exempt from regulation, producer-distributors could avoid the necessity of sharing the more profitable fluid milk market with the other producers, and thereby cause a reduction in the uniform price received by those producers (see Pet. App. 41, 58). See also *Nebbia* v. *New York*, 291 U.S. 502, 517-518.[6]

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[6] The exemptions afforded by Section 927.65(h). (App., *infra*, p. 19; see footnote 4, *supra*, p. 6) were formulated by the Secretary on the basis of his finding that the volume of milk involved was not substantial enough to constitute a serious competitive factor in the marketing area. See 22 F.R. 4218. "Since the Secretary was not required by the Act to create any such exception, he had a wide discretion as to the manner in which he contrived it." *Queensboro Farms Products* v. *Wickard*, 137 F. 2d 969, 980 (C.A. 2).

4. Contrary to petitioner's contentions (Pet. 6-7)[7], "from the very beginning the Department of Agriculture has construed the Act so as to permit regulation of producer-handlers in their capacities as handlers" (Pet. App. 77). The statutory authorization for the issuance of milk marketing orders, which became effective August 24, 1935 (49 Stat. 750), contained the present Sections 8c(1), 8c(5)(A), 8c(5)(C), and 8c(13)(B), which were re-enacted by the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. During all of the time since the Act of August 24, 1935, milk marketing orders have provided for the regulation of handlers with respect to milk produced by those handlers.[8] In fact, even prior to the

[7] Petitioners also urge that the regulatory scheme imposes a confiscatory "penalty" or "tax" on handlers in their position (Pet. 8). This assertion is wholly without merit. It can be readily seen that the effect of the Order is merely to place such handlers in the same position as the other regulated handlers.

That Congress contemplated the creation, in appropriate marketing areas, of an "equalization fund" to adjust payments among handlers with regard to their utilization of milk is made plain by the provisions of Section 8c(5)(C) of the Act, 7 U.S.C. 608c(5)(C). That some of the orders do not make use of an equalization fund (see Pet. 8) is beside the point, because, in some of the marketing areas, the device deemed appropriate is an "individual handler pool." See, *e.g.*, 7 C.F.R. Part 961. Even in these areas, however, it is common to regulate the handler on the basis of his own milk production as well as that received from others.

[8] See, *e.g.*, the handler definition in Order No. 11 for Washington, D. C., effective September 21, 1936, on file in the National Archives; Section 903.1(e) and (f) of the St. Louis Order, effective April 5, 1939, 7 C.F.R. (1939 Supp.) 903.1(e), (f); Section 912.1(c) and (d) of the Dubuque, Iowa, Order, effective June 16, 1939, 7 C.F.R. (1939 Supp.) 912.1(c), (d); Section 904.1(e) and (f) of the Greater Boston Order, effective February 4, 1940, 7 C.F.R. (1940 Supp.) 904.1(e), (f); Section 961.1(a)(5) and (6) of the

Act of August 24, 1935, the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended, provided for the issuance of licenses applicable to the marketing or handling of milk; these licenses also regulated handlers who distributed milk of their own production. See, *e.g.*, Art. II, § 1, pars. 5 and 7 of the amended license for the Chicago milk marketing area, on file in the National Archives.

5. In final support of their contentions, petitioners point (Pet. 5-6) to the decision rendered by the United States District Court for the Southern District of Mississippi in *Benson* v. *L. B. Vance, et al.* (Civil No. 1495, May 14, 1960), appeal pending *sub nom. Freeman* v. *L. B. Vance, et al.* (No. 18,731, C.A. 5). The *Vance* case involves the validity of certain provisions of Milk Marketing Order No. 87, 7 C.F.R. Part 987, applicable to the handling of milk in the Central Mississippi Marketing Area, which—like the provisions of Order No. 27 here challenged—subject handlers to regulation with respect to their own farm production. The district court held that such regulation was not authorized by the Act, relying upon the same arguments advanced by petitioners in the present case.

The Court of Appeals for the Fifth Circuit heard the government's appeal from this ruling on April 25, 1961, but has not yet rendered its decision. There is therefore, no existing conflict between the circuits. The

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Philadelphia Order, effective April 1, 1942, 7 F.R. 2377, 2378; Section 945.3(e) and (f) of the Washington, D. C., Order, effective November 3, 1945, 7 C.F.R. (1945 Supp.) 945.3(e), (f). Such a flexible approach, gearing the terms of an order to the particular economic conditions existing in a specific marketing area at a given time, is required by the provisions of the Agricultural Marketing Agreement Act of 1937. See 7 U.S.C. 608c(11)(C).

isolated—and, we submit, erroneous—decision of one district court does not provide a sufficient basis for granting certiorari.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition should be denied.

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August, 1961

APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, provides, in pertinent part:

§ 608c. Orders regulating handling of commodity.

* * * * * * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: *Provided*, That, except in the case of orders covering milk products only, such provision is approved or favored by at least three-fourths of the producers who, during a representative period

determined by the Secretary of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered; subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * * * * * * *

(13) *Retailer and producer exemption.*

* * * * * * * * *

(B) No order issued under sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * * * * * * *

Section 927.65 of Milk Marketing Order No. 27, effective August 1, 1957, 22 F.R. 4652-4653, provides:

§ 927.65. *Net pool obligation of handlers.* The handler's net pool obligation shall be computed pursuant to paragraphs (a) through (g) of this section: *Provided*, That milk specified in paragraph (h) of this section shall be eliminated from this computation and such milk shall be deemed to be excluded by the phrase "milk received from producers" as such phrase is used in this section and in §§ 927.43, 927.66, 927.79, 927.81, 927.82, and 927.90.

(a) Determine the classification pursuant to §§ 927.30 through 927.37 of milk received from producers at each pool plant;

(b) Subject to adjustments for appropriate differentials pursuant to §§ 927.41 and 927.42, multiply the milk in each class by the class price, multiply the skim milk subject to the fluid skim differential by the fluid skim differential, and add together the resulting values;

(c) Deduct, in the case of each plant where the average butterfat content of all milk received from producers is in excess of 3.5 percent, and add, in the case of each plant where the butterfat content of all milk received from producers is less than 3.5 percent, the total value of the butterfat differential applicable pursuant to § 927.72;

(d) Deduct, in the case of each plant nearer New York City than the 201-210 mile zone, and

add, in the case of each plant farther from New York City than the 201-210 mile zone, the sum obtained by multiplying the milk received from producers by the zone differential set forth in column B of the schedule in § 927.42 applicable to the plant;

(e) Deduct the total amount of the butter-cheese adjustment computed pursuant to § 927.43;

(f) Deduct the total value of the nearby differential to be paid producers pursuant to § 927.71(b). The computation to this point shall be known as the handler's net pool obligation;

(g) Add together the handler's net pool obligation for all plants at which milk was received from producers; and

(h) Milk specified in subparagraphs (1) through (3) of this paragraph shall be excluded from the computation of the handler's net pool obligation pursuant to this section.

(1) Milk received from farms in Nassau and Suffolk Counties in New York, which farms are not approved for sale of milk in New York City and milk received from farms in New York City.

(2) Milk received at a handler's plant not in excess of an average of 800 pounds per day from such handler's own farm in the event that no milk is received at such plant from other dairy farmers but is received from other plants.

(3) All milk received at a handler's plant from such handler's own farm in the event that no milk is received from any other source at such plant.

Section 927.65 was amended on September 1, 1958 (23 F.R. 6737, 6739-6740), as follows:

Amend § 927.65(h)(2) and (3) to read as follows:

"(2) Own farm milk not in excess of an average of 800 pounds per day if the handler is not a producer-handler designated pursuant to § 927.15 and if the volume of milk, other than own farm milk, handled does not exceed an average of 1,600 pounds per day.

"(3) All milk handled by a producer-handler designated pursuant to § 927.15 which is derived from such producer-handler's production resources and facilities."

Amend § 927.65(h) by inserting a new subparagraph (4) as follows:

"(4) Own farm milk of a charitable, religious, educational or governmental institution which is not engaged in the practice of receiving bulk milk from other sources for processing or packaging and is not engaged in the practice of selling packaged milk to persons not associated with such institution."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. [redacted] 17

IDEAL FARMS, INC. and FRANKLIN LAKES DAIRY PRODUCERS, INC., *Petitioners*

v.

ORVILLE L. FREEMAN, SECRETARY OF AGRICULTURE OF THE UNITED STATES OF AMERICA, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF IN SUPPORT OF THE PETITION

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IDEAL FARMS, INC. and FRANKLIN LAKES DAIRY PRODUCERS, INC., *Petitioners*

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REPLY BRIEF IN SUPPORT OF THE PETITION

Respondent in his Brief in Opposition to the certiorari lays stress on certain cases which he argues support the decisions of the Courts below in this action. Petitioners contend that the arguments and applicability of the cited

cases are neither in point nor even analogous to the question presented by this action.

Respondent's assertion that Petitioners based their contention almost entirely on the fact that an Order may be formulated "only in terms of milk 'purchased' by handlers" is an inaccurate statement.[1] Petitioners complaint is to pricing provisions which are based upon milk *not* purchased, the effect of which obliges Petitioners to pay money into the Producer Settlement Fund for distribution to producers other than themselves.[2] To date the money thus exacted from Petitioners totals more than $137,075.49. With respect to every other aspect of the Order Petitioners are in compliance and are not here questioning their validity. However, the requirement that Petitioners pay monies to the Market Administrator for the Producer Settlement Fund is a pricing provision and as such must find its authority in Section 8c(5)[3] of the Act.[4] It is in Section 8c(5) that the Congress clearly indicated its intention to restrict pricing provisions to that milk purchased. A clearer expression of intention is not possible.

The cases relied on by the courts below and by the Respondent fall basically into two categories: first, there is a line of cases which concededly ascribes a broad interpretation to the word "purchased" as used in this statute. The case of *United States v. Rock Royal Cooperative*[5] held *inter alia* that a cooperative entity acting as an agency for its members individual farmers, must for purposes of the Act be regarded as having purchased the milk it handled and marketed for its members. The case involved the contention by an agency type cooperative that it was

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[1] Resp. Br. 8.

[2] 7 C.F.R. 927.65.

[3] 7 U.S.C. 608c(5)(A).

[4] Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*

[5] *United States v. Rock Royal, Cooperative, Inc.*, 307 U.S. 533, 59 S. Ct. 933, 83 L. Ed. 1446 (1939) (Resp. Br. 9).

not liable to pay a pool obligation into the administrative fund or to meet the expenses of administration. The reason asserted for its freedom from liability was that it was a cooperative composed of producers and distributed the milk of its members and others as agent. Mr. Justice Reed reasoned:

> "It is obvious that the use of the word 'purchase' in the Act, § 8c(5)(A) and (C), would not exclude the 'sale' type of cooperative. When § 8c(5)(F) was drawn, however, it was made to apply to both the 'sale' and 'agency' type without distinction. This would indicate there had been no intention to distinguish between the two types by (A) and (C)."

The Court held that the cooperative must, because of this explicit wording of the statute, contribute to the fund. Note this important language used by Mr. Justice Reed at page 571:

> "Payments into and withdrawals from this fund depend upon the 'value' of the milk received which is fixed by the Order at different prices governed by the use made by the handler of the *purchased* milk . . . " (Emphasis added).

and at page 581:

> "As the cooperative *does not have its own farm* but is itself a handler under the Act, it must pay into the producer settlement fund." (Emphasis added.)

Clearly the Court attached significance to the word "purchased" (there used in the Order). The above quoted language shows that the Court based its opinion that the Cooperative must pay into the Producer Settlement Fund upon the fact that the Cooperative *did not have its own farms*. In the instant case, Petitioners have and operate their own farms and herds. The milk produced by them is never sold, transferred or consigned to anyone else until finally sold to the consumer.

Respondent relies similarly on the case of *Elm Spring Farm v. United States.*[6] In the *Elm Spring* case, a cooperative, organized by officers and stockholders of a pre-existing corporation engaged in handling milk, took over the business of the pre-existing corporation. The cooperative then took title to cattle (but not possession) from farmers, giving back mortgages and other contracts providing for short notice cancellation and recision of the transactions. The Court examined all the intricacies of the various agreements and the identity of the parties, and determined that the cooperative's arrangement was nothing more than a device to avoid subjection to the Milk Marketing Order. See the Court's language at pages 926 and 927:

> "We agree with the district court that Cooperative is not a 'producer' and that the milk received from its so-called 'herdsmen' is not milk of its 'own farm production' as those terms are used in the Order.
>
> "If Cooperative had had the straightforward purpose of becoming a producer of milk it would hardly have negotiated the rather weird series of agreements previously summarized in this opinion. . . .
>
> "In effect what Cooperative did was to say to the farmers: 'If you will become a party to this elaborate camouflage we will pay you 23¢ a hundredweight more than the blended price for your milk'. . . .
>
> "Cooperative might have become a producer by acquiring a farm and milk cows and going into the business of operating a dairy farm with the attendant risks of loss. 'It chose to employ the scheme in question here. It considered it advantageous to avoid the risks of production and now must bear the burdens of a determination that other entities than itself are the producers.'"

It is important to note here that many years ago—long before the attempted regulation of producer-distributors—Petitioners in the instant case did the very things the Court

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[6] *Elm Spring Farm v. United States*, 127 F. 2d 920 C. A. 1 (1942) (Resp. Br. 10).

determined Elm Spring Farm had not done. Petitioners are in fact producers operating their dairy farms with all the risks of loss normally attendant to farm operation. The decision in the *Elm Spring* case was based upon the factual determination that the cooperative was NOT the producer. There is no such contention in the present case.

Finally, the Respondent suggests that support for his position is found in the case of *Shawangunk Cooperative Dairies, Inc. v. Jones.*[7] The *Shawangunk* action, like the *Elm Spring* case, *supra*, involved milk determined by the Court not to have been own farm production. Meadow Valley Farms, Inc., a corporate handler, ceased to operate its plant but arranged for delivery of its producer milk supplies to Shawangunk, a cooperative and a handler under the Order. The arrangement was represented as temporary, but after four months it was determined not to be a temporary arrangement. Assessments were then made against Shawangunk for contribution to the producer settlement fund. Shawangunk argued that it was a gratuitous bailee which did not purchase the milk. The Court concluded that Meadow Valley was to be regarded as the producer's agent to deliver the milk to a handler (Shawangunk), who was subject to the regulations of the Order. In this posture, the cooperative stood in the same position as the cooperatives in the *Elm Spring* and *Rock Royal* cases. Similarly, the decision here followed the decisions of those cases. In all three cases the principals were found to have "received" or "acquired for marketing" from other persons the milk on which the assessments had been made. The words "received" and "acquired for marketing" from another person or entity were equated with the word "purchased". The essential finding in each of the three cases was that the milk handled was not produced by those against whom the assessments were made.

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[7] *Shawangunk Cooperative Dairies v. Jones, et al.*, 153 F. 2d 700, C. A. 2 (1946) (Resp. Br. 10).

Consonant with these decisions is the opinion of the late Chief Judge Learned Hand of the Second Circuit in the case of *Dairymen's League Cooperative Association v. Brannan.*[8] In that case, the obligation to the Producer Settlement Fund depended upon whether certain milk was to be classified as II-A or III-D. To be classified as III-D, milk in the form of cream had to be delivered as cream to a "purchaser" of a certain type. To be classified as II-A, it had to be delivered to a "purchaser" of another type.

The facts were as follows: the Plaintiff owned two "country plants" where it made milk owned by it into cream. The Plaintiff then moved the cream from these two plants located in New York State to another plant owned by the Plaintiff in Newark, New Jersey. At this second plant, the Plaintiff sold the cream to other handlers. The question then arose as to when the first purchase of this cream took place. The Plaintiff contended that under the *Rock Royal* case, which interpreted the word "purchased" to mean "acquired for marketing", the first sale (purchase) took place when the Plaintiff moved *the milk from its "country plants" to its Newark plant.* The Government contended that the first sale took place when the Newark plant sold the milk to another handler. The Plaintiff's contention would have lowered its obligation to the Producer Settlement Fund, whereas the Government's contention would have increased the Plaintiff's obligation to the Producer Settlement Fund. The United States District Court held that the movement of the milk from the "country plants" of the Plaintiff to its Newark plant did not constitute a "sale" or a "purchase" or an "acquisition for marketing". The Plaintiff appealed. The Court of Appeals for the Second Circuit affirmed the lower court, stating:

> "The plaintiff first argues that its delivery to its Newark 'plant' was a purchase, for which it relies upon

[8] *Dairymen's League Cooperative Association v. Brannan*, 173 F. 2d 57, C. A. 2 (1949), cert. denied, 338 U.S. 825, 94 L. Ed. 501.

> a remark of Reed, J., in United States v. Rock Royal Co-operative, Inc. that 'purchased' means 'acquired for marketing'. That was said in discussing sales of milk by 'producers' to their cooperative, as to which the Act was explicit; it was not intended as a general definition, and to use it in interpreting III-D would unduly expand the court's meaning. * * * Since the first 'plant' was the two 'country plants' and there was no sale from them, we need consider only the proper classification at the plaintiff's Newark 'plant'. * * * "

Consideration of the facts of these cases necessarily leads to the conclusion that the decisions were adopted to preclude the use of any device or scheme to circumvent the clear intention of the Act, i.e., that milk handled between producers and handlers should be priced by the Marketing Order. It is submitted, however, that for the Court to have decided that "milk purchased" means "milk not purchased" is not only judicial legislation but in fact contravenes the express intention of the Congress of the United States in the passage of this Act.

The other line of case law depended upon by the Respondent is exemplified by only one case, a District Court case in California, *Acme Breweries v. Brannan*.[9] The latter case does in fact involve a producer who is also a handler; however, the part of this Act applicable to Acme Breweries, who raised and distributed hops, is essentially different than that applicable to milk.[10] The production

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[9] *Acme Breweries v. Brannan*, 109 F. Supp. 116. (Resp. Br. 11).

[10] The Agricultural Marketing Agreement Act provides for marketing orders of various products and there are substantial variances in the methods of regulation authorized by the Act. Of the 58 paragraphs appearing in 8c of the Act, 24 are *specific prescriptions* of regulations for *specific products* and not of general application.

Reference in Section 8c(5) is made repeatedly to "milk purchased" [Sections 8c(5)(A), (C), and (E)]. But note the author-

and distribution of hops was expressly intended by the Congress to be *limited*, when necessary, to achieve price and industry stabilization.

Acme argued that it was not a handler, but an ultimate consumer, and therefore, was not subject to regulation under the Act. The Court held to the contrary. No such contention is made by Petitioners in this case. It has been conceded since the inception of these proceedings that Petitioners are "handlers" within the intendment of the Order (since they have proper health approval), and beyond this point the two cases bear no analogy at all. The Act clearly gives authority to control or limit the total quantity of hops handled by any handler who produces his own hops. On the contrary, there is no authority in the Act to price or limit quantities of milk handled. No authority is granted except to price milk purchased.

In the case of *Benson v. Vance* [11] the Court held as follows:

> "It would be difficult to apply a definition to the word 'purchaser' which would imply that one can purchase anything from himself. Such a definition would rise to an absurdity. If one produces an article, it is

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ity to regulate other products "purchased or handled" in Section 8c(6):

> (B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler *may purchase* from or *handle* on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts sold by such producers in such prior period as the Secretary determines to be representative, or upon the current quantities available for sale by such producers, or both, to the end that the total quantity thereof to be *purchased*, or *handled* during any specified period or periods shall be apportioned equitably among producers." (Emphasis added).

[11] *Benson v. L. B. Vance, et al.* (Civil No. 1495, S.D. Miss., May 14, 1960), appeal pending *sub nom: Freeman v. L. B. Vance, et al.* (No. 18,731, C.A. 5).

> his without purchase and a fair definition of 'purchase' may be found in the case of U.S. v. Scovil, 348 U.S. 218."

See also the language of the Court in the case of *Bowles, Administrator, v. Nelson-Ricks Creamery Co.*,[12] a case arising under the Emergency Price Control Act of 1942:

> "(c)(1) Defines a 'Primary Wholesaler' as a person who purchases or receives cheese from two or more cheese factories or cheese makers. Can it be said that the defendant in taking its own cheese from its own factories and storing it in its own warehouse purchased or received the cheese in question? Purchase means 'acquisition by giving an equivalent in money or other exchange value.' 'That which is bought with money.' Receive means 'To get as a result of delivery, transmission or collection.' *It would be a very strained construction to say that you can purchase from yourself or that you can receive from yourself.* (Emphasis added.)

For the foregoing reasons and for those reasons heretofore stated in the Petition for Writ of Certiorari, it is respectfully submitted that the Petition should be granted.

WILLIS F. DANIELS
HAROLD W. SWOPE
DONN L. SNYDER

August, 1961

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[12] *Bowles, Administrator v. Nelson-Ricks Creamery Co.*, 66 F. Supp. 885.